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Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

E.I. DUPONT DE NEMOURS AND COMPANY
and GOODSILL ANDERSON QUINN & STIFEL,

Petitioners,

v.

SHARON MURAKAMI and HARVEY TOMONO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a lawsuit seeking to enjoin and recover damages for the removal of another case to federal court in alleged violation of an agreement that a state court has jurisdiction necessarily depend on the resolution of substantial federal questions? Or, as the Ninth Circuit held, do state law and state courts entirely control whether an injunction, damages and sanctions are to be awarded against the defendant who removed the other case to federal court?

STATEMENT PURSUANT TO SUPREME COURT RULES 14.1(b) AND 29.6

The caption contains a list of all parties to the proceedings in the Ninth Circuit.

There is no parent or publicly held company owning 10% or more of the corporate Petitioner DuPont's stock.

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Petitioners, E.I. duPont de Nemours and Company ("DuPont") and Goodsill Anderson Quinn & Stifel ("Goodsill"), respectfully request the issuance of a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit attached at pages App. 1 through 11 of the Appendix hereto.

OPINIONS BELOW

The Ninth Circuit's opinion and the revision on rehearing, dated September 9, 1999 and December 3, 1999 respectively, are at pages App. 1 through 11 of the Appendix. The opinion is reported at 1999 WL 701902. The revision is reported at 1999 WL 1103354.

The April 23, 1998 opinion of the United States District Court for the District of Hawaii reversed by the Ninth Circuit is at pages App. 12 through 18 of the Appendix. It has not been reported.

STATEMENT OF BASIS FOR JURISDICTION IN THE UNITED STATES SUPREME COURT

The opinion, dated September 9, 1999 and the revision and denial of the motion for reconsideration, dated December 3, 1999, which are here sought to be reviewed, constitute a final judgment of the Ninth Circuit Court of Appeals. (App. 1 through 11)

Pursuant to 28 U.S.C. § 1254(1), which provides for review of cases in the courts of appeals, this Court has jurisdiction to review on a writ of certiorari, granted upon this petition of a party to the case, the Ninth Circuit's decision holding there to be no federal jurisdiction over a removed

civil action alleging wrongful removal to federal court of another suit and directing that the wrongful-removal suit be dismissed without prejudice.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN CASE

The Constitutional provisions and statutes involved in the case are reproduced at pages App. 46 through 50 of the Appendix. They consist of Sections 1 and 2 of Article III of the United States Constitution (judicial power of the United States), the second paragraph of Article VI of the United States Constitution (Supremacy Clause), 28 U.S.C. §§ 1331, 1441(a)(b), 1446(d), 1447(c) (federal jurisdiction and removal) and Federal Rule of Civil Procedure 11(b&c), which together comprehensively provide for and govern all aspects of removal and federal court jurisdiction.

STATEMENT OF THE CASE

In the cases that are the subject of this petition, Plaintiffs commenced actions in a Hawaii state court against DuPont and Goodsill, DuPont's lawyers, alleging that they had wrongfully removed Plaintiffs' previously filed fraud case to federal court. For clarity, the cases are herein identified as follows:

- The "Fraudulent Inducement Case" is the previously filed fraud case DuPont had removed.

- The "Wrongful Removal Cases" are the separate cases Plaintiffs brought, also removed by DuPont, which are the subject of this Petition and which allege that DuPont had wrongfully removed the Fraudulent Inducement Case.

In the Wrongful Removal Cases, Plaintiffs sought in Hawaii state court to enjoin DuPont and its lawyers from continuing to pursue removal in federal court, sought to impose sanctions on DuPont and its counsel amounting to millions of dollars and sought to have DuPont and its lawyers imprisoned, all because they removed the then-pending Fraudulent Inducement Case to federal court. The Ninth Circuit would allow the propriety of such relief to be determined by the state courts applying state law. In doing so, the Ninth Circuit's decision fundamentally derogates the exclusive federal control over such issues intended by the Constitution and Congress and recognized by this Court.

The substantive issues raised by the Wrongful Removal Cases are whether a separate lawsuit can be brought based on an alleged wrongful removal of another case to federal court; and, if so, what the elements of such a claim are, whether the elements were proved and what relief should be granted. Considering these issues to be federal questions, DuPont and its lawyers removed the two Wrongful Removal Cases that are the subject of this appeal to federal court.

Plaintiffs sought a remand. The district court denied remand and dismissed the Wrongful Removal Cases with prejudice. The Ninth Circuit reversed, holding that Plaintiffs' claims arose under and were governed entirely by state law and directing that the Wrongful Removal Cases be dismissed without prejudice.

The Ninth Circuit's decision is a serious threat to federal control over whether removal is proper and over the terms, conditions and consequences of removal. The determinative issue is whether the substantive issues in these Wrongful Removal Cases present federal questions conferring federal

jurisdiction under 28 U.S.C. §§ 1331 and 1441(b). The Ninth Circuit's opinion, if sustained, would allow state courts to formulate the law determining whether separate actions can be brought to control and penalize the pursuit of removal, and it would allow state courts to determine whether a removal to federal court was wrongful, actionable and sanctionable and whether to enjoin federal proceedings.

The Fraudulent Inducement Case, which is the subject of the Wrongful Removal Cases, is itself successive litigation arising out of previously settled cases, referred to here as the "Products Liability Cases." The Products Liability Cases were litigated against DuPont in Hawaii state court in the early 1990s by several commercial growers, including the Plaintiffs here. The Products Liability Cases claimed, *inter alia*, that DuPont's Benlate® fungicide was defective and had damaged the Plaintiffs' crops.

Plaintiffs and DuPont settled Plaintiffs' Products Liability Cases in 1994, pursuant to which Plaintiffs were paid (and still retain) $1,100,000 and DuPont received a general release of any and all claims. The Fraudulent Inducement Case alleges that the settlements of the Products Liability Cases were fraudulently induced and seeks to recover as damages additional amounts equal to the difference between the alleged "true value" of the Products Liability Cases and the settlement amounts paid and retained.

The stipulations of dismissal with prejudice that terminated the Products Liability Cases when they were settled in 1994 contain a retention of jurisdiction provision, sometimes denominated a "forum selection clause" in the Ninth Circuit's opinion, which provides:

> [T]his [Hawaii state] Court shall retain jurisdiction to resolve any disputes amongst the parties relating to this action, including, but not limited to, disputes arising out of its settlement.

(App. 3.)

In May 1997, when Plaintiffs filed the Fraudulent Inducement Case in Hawaii state court, they filed it as a class action, and they named as defendants, in addition to DuPont, a distributor and a sales representative who were Hawaii residents. DuPont removed the Fraudulent Inducement Case to federal court, claiming diversity jurisdiction because the two Hawaii-resident defendants had been fraudulently joined. DuPont was represented in all the Hawaii cases by Goodsill, a law firm in Honolulu.

Plaintiffs moved to remand the Fraudulent Inducement Case on July 9, 1997. Plaintiffs contended that the removal of the Fraudulent Inducement Case was improper for reasons that included the retention of jurisdiction clause in the dismissal of the Products Liability Cases. Eventually, in January 1998, the district court remanded the Fraudulent Inducement Case not on the basis of the retained-jurisdiction clause, but for lack of diversity, rejecting DuPont's argument that the Hawaii-resident distributor and sales representative had been fraudulently joined. (App. 30-45.)

Before the remand, however, in September 1997, a hearing had been set in Fraudulent Inducement Case in the federal District Court for the District of Hawaii, to consider the propriety of the removal of the Fraudulent Inducement Case. Days before the federal hearing, Plaintiffs commenced in Hawaii state court these Wrongful Removal Cases, this time against DuPont and Goodsill, the Hawaii lawyers

representing DuPont in the Fraudulent Inducement Case removal proceedings.[1] These Wrongful Removal Cases were denominated "Special Proceedings" and are referred to as such in the Ninth Circuit's opinion.

Based on the retained-jurisdiction provision in the dismissal of the Products Liability Cases, the Wrongful Removal Cases asked the Hawaii state court to enjoin DuPont and Goodsill from proceeding in federal court in the removal of the Fraudulent Inducement Case. Plaintiffs requested the Hawaii state court to enter an order precluding DuPont and Goodsill from prosecuting or defending any claims in federal court. The Wrongful Removal Cases further asked the Hawaii state court to sanction DuPont and Goodsill and hold them in contempt for removing the Fraudulent Inducement Case. Plaintiffs sought $1,500,000 in punitive sanctions plus $1,500,000 per day until the notice of removal to federal court was withdrawn. Plaintiffs also sought to have DuPont and Goodsill personnel imprisoned by order of the Hawaii state court until Plaintiffs' demands were met. (App. 95; 118; 76-77.)

DuPont and Goodsill removed the Wrongful Removal Cases to federal court, claiming that the Wrongful Removal Cases presented federal questions and were therefore removable

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1. The Ninth Circuit's opinion incorrectly states that the Wrongful Removal Cases were brought *after* the federal court remanded the Fraudulent Inducement Case. (App. 4-5.) The Wrongful Removal Cases were brought in September 1997, and the Fraudulent Inducement Case was remanded in January 1998. (App. 51-118; 30-45.)

Footnote 2 of the opinion incorrectly describes the Wrongful Removal Cases as an "uncertified class action." (App. 2.) While the Fraudulent Inducement Case contains class allegations, the Wrongful Removal Cases do not. (App. 51-118.)

under federal-question jurisdiction and, also, that Goodsill had been fraudulently joined to defeat diversity jurisdiction. The district court ruled that it had jurisdiction because Goodsill had been fraudulently joined and did not reach the federal question issue. (App. 14-18.) The district court found the retained-jurisdiction provision non-exclusive and "permissive" and thus not to preclude removing the Fraudulent Inducement Case. (App. 17.[2]) The district court dismissed the Wrongful Removal Cases with prejudice, finding that sanctions for improper removal were not warranted under 28 U.S.C. § 1447(c) or Federal Rule of Civil Procedure 11. (App. 16-18.)

The Ninth Circuit opinion reverses the District Court's jurisdictional ruling on fraudulent joinder, finding Plaintiffs to "have raised a plausible claim under Hawaii law" against DuPont's lawyers, Goodsill, for an allegedly improper removal of a case to federal court. (App. 8.) The Ninth Circuit held, as a result, that the district court lacked diversity jurisdiction and directed the District Court to dismiss the Wrongful Removal Cases without prejudice, instead of with prejudice. (App. 9.)[3]

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2. The court references its explanation to an order entered a related case. That order is at pages App. 19-24 of the Appendix, particularly pages App. 22-24. The case in which that order was entered is a separate case DuPont brought against Plaintiffs here, in which DuPont asserts claims for these Plaintiffs' breach of their settlement agreements.

3. This direction is additional error regardless of how the questions presented are decided. If no federal jurisdiction existed over the Wrongful Removal Cases, the only appropriate action by the district court would be remand, 28 U.S.C. § 1447(c), and the district court would be without power to dismiss the cases, with or without prejudice. Absent subject matter jurisdiction, a district court can do nothing with a removed case except remand it to the state court. *International Primate Protection League v. Administrators*

(Cont'd)

As for DuPont's contentions that federal questions are presented in determining whether a removal is wrongful or sanctionable, the opinion (as revised) states in footnote 7 as follows:

> We reject DuPont's attempt to invoke federal question jurisdiction. On the merits, this case involves a dispute over the scope and interpretation of a retention of jurisdiction provision in a settlement agreement approved by an order of a state court. The construction and enforcement of such an order are questions of state law. *See Jeff D. v. Andrus*, 899 F.2d 753, 759 (9th Cir. 1990).

(App. 11.) The opinion further provides that Hawaii law will determine whether the retention of jurisdiction provision, characterized as a "forum selection clause," was a valid waiver of the right to remove the Fraudulent Inducement Case. (App. 8.)

THE REASONS THE WRIT SHOULD BE ALLOWED

The Ninth Circuit's opinion has erroneously decided an important federal question in conflict with decisions of other Courts of Appeal and this Court in holding there to be no federal

(Cont'd)
of Tulane Educ. Fund, 500 U.S. 72, 89 (1991); *Coyne v. American Tobacco Co.*, 183 F.3d 488, 496-97 (6th Cir. 1999); *University of S. Ala. v. American Tobacco Co.*, 168 F.3d 405, 410-13 (11th Cir. 1999); *Bromwell v. Michigan Mut. Ins. Co.*, 115 F.3d 208, 213 (3d Cir. 1997); *Bruns v. National Credit Union Admin.*, 122 F.3d 1251, 1257-58 (9th Cir. 1997); *Roach v. West Va. Reg'l Jail and Correctional Facility Auth.*, 74 F.3d 46, 49 (4th Cir. 1996).

question presented by the Wrongful Removal cases, for two reasons.

The first reason is dispositive: federal law exclusively governs whether removal is proper, and it must do so in order for removal and federal jurisdiction to safeguard against states not properly adjudicating federal rights and protecting the rights of non-residents. These safeguards are illusory if a state court and state laws are permitted to determine when federal removal is proper and to impose damages or sanctions on removal deemed by a state tribunal to be improper. To protect the right of removal, this Court's cases clearly hold that such matters are governed by federal law and controlled by federal courts.

Thus, even if the construction of the retained-jurisdiction provision were a state law issue, the effect of that provision on the right to removal is a federal question. The issues in the Wrongful Removal Cases go far beyond the construction of the provision and even beyond the sustainability of the removal of the Fraudulent Inducement Case; they deal with whether the removal was wrongful, actionable or sanctionable in a separate case and what relief, if any, should be accorded.

These are federal issues. If the Ninth Circuit's decision ceding such broad powers to a state is not corrected by this Court, the consequences will be short-term confusion engendering a spate of state court "wrongful removal" suits and long-term encroachment on the essential protections and policies underlying removal and federal jurisdiction.

Secondly, moreover, the construction of a clause contended to waive the right to proceed in federal court is, when presented to a federal court, a federal procedural issue governed by federal law. Therefore, one of the essential "elements" of a wrongful removal action — assuming such

an action exists — is dependent on the answer to the federal procedural question. Under the Ninth Circuit's holding, a state court deciding a wrongful removal case, somehow applying state law, would have the power to answer questions of federal procedural law posed to the district court in the removed case. This is not proper; the construction of a clause contended to prevent removal is a federal question.

1. Federal law controls the propriety and consequences of removal

The Ninth Circuit's opinion holds that no federal questions are presented in determining whether a removal was wrongful and sanctionable or in formulating the law governing relief from wrongful removal. The opinion says that state courts, applying state law, appropriately decide such issues.

To the contrary, *Harrison v. St. Louis & San Francisco Railroad Co.*, 232 U.S. 318, 329 (1914), holds:

> [W]hen an issue of whether a prayer for removal was rightfully asked arises, *a Federal question results* which is *determinable by the courts of the United States* free from limitation or interference arising from an exertion of state power. . . . [A]s the right freely exists to seek removal unchecked or unburdened by state authority, and the duty to determine the adequacy of a prayed removal is a *Federal, and not a state, question*, it follows that the *states are*, in the nature of things, *without authority to penalize or punish one who has sought to avail himself of the Federal right*

> *of removal* on the ground that the removal asked was unauthorized or illegal.

(Emphasis added).

In *Harrison*, the removing defendant's right to transact business in the state was forfeited by the state pursuant to a state statute, because the defendant had removed a previous case to federal court. The removing defendant successfully brought a federal action challenging the state's right to govern and penalize removal by forfeiture of the right to do business in the state.

Under the Ninth Circuit's reasoning, however, no federal question or federal jurisdiction would have existed in the *Harrison* case; the construction and effect of a state statute and corporate ruling would have been a state law question to be decided by the state courts, and no federal court would have had any basis or jurisdiction for deciding as this Court did. Had this Court adopted the Ninth Circuit's approach in *Harrison*, a state legislature or court would be able through the imposition of penalties and damages to encumber or prevent removal and to force state court adjudications of federal questions or cases against a citizen of another state.

Harrison requires that the Ninth Circuit's decision be corrected. The Wrongful Removal Cases, which the Ninth Circuit holds involve only state law issues properly decidable by state courts, seek to prevent and recover damages for the removal as violative of an agreement approved by the state court. Even though the agreement was made under state law, its enforceability presents a federal question when its enforcement bears on the federal right to remove — just as the state's enforcement of its corporate provisions in

Harrison became federal questions when removal was impacted.

This Court's decision in *Commissioners of Road Improvement District No. 2 of Lafayette County, Arkansas v. St. Louis Southwestern Railway Co.*, 257 U.S. 547 (1922), also demonstrates that state law cannot determine whether a case is removable. The Supreme Court of Arkansas had held that the proceedings in issue were not "judicial controversies," and consequently it was argued that the proceedings were not cases and could not be removed. This Court, however, sustained the removal, holding:

> The question of removal under the federal statute is one for the consideration of the federal court. It is not concluded by the view of a state court as to what is a suit within the statute.

Id. at 557-58.

Here, the Ninth Circuit concluded that, because state law controlled the construction of the so-called forum selection clause,[4] state law must control whether removal is appropriate. But, as the Supreme Court explained three-quarters of a century ago:

> The issue as to removal is akin to the question, which sometimes arises in enforcing the inhibition against state laws impairing the obligation of a contract, whether there is a contract under state law. This court decides that for itself.

Id. at 558. Federal law determines whether there is a contract and whether it has been impaired, even though the contract

4. A supposition shown in the next section to be incorrect.

is a creature of and governed by state law. Similarly, even though a "forum selection clause" may be created under and in other contexts be governed by state law, federal law applies when deciding whether federal removal is proper and whether and what relief should be granted in a case alleging wrongful removal.

As to the claims in the Wrongful Removal Cases for an injunction against proceeding in federal court or for sanctions for doing so, this Court also has unequivocally and specifically ruled that states are completely without authority to enjoin federal proceedings or to sanction proceedings in federal court. *Donovan v. City of Dallas*, 377 U.S. 408, 411-12 (1964), reversed a state court order enjoining the litigants from proceeding in federal court and vacated a contempt citation based on the injunction order. The state court order was based on allegations that the federal court suit was res judicata and vexatious and harassing. This Court held that state courts can *never* enjoin a party from proceeding in a federal court:

> [S]tate courts are completely without power to restrain federal-court proceedings in *in personam* proceedings like the one here. And it does not matter that the prohibition here was addressed to the parties rather than to the federal court itself.

Id. at 412-13. Because Congress has granted the right to pursue federal court remedies, "the Texas courts were without power to take away this federal right by contempt proceedings or otherwise." *Id.* at 413-14. This Court explained that the defense of res judicata and the claims of vexation could be decided by the federal court and that the *federal* court could certainly dismiss the federal suit if

appropriate for these reasons. *Id.* at 412. But the state court could not enjoin the federal plaintiff from proceeding in federal court for these or any other reasons.

The decision in *General Atomic Co. v. Felter*, 434 U.S. 12 (1977), confirmed the breadth of *Donovan*'s holding. There, this Court held that state courts could not enjoin any "pending or prospective" federal litigation and rejected an "harassment" exception to *Donovan*. Any other result would have been "untenable and . . . in direct conflict with [*Donovan*] and the Supremacy Clause of the Constitution." *Id.* at 15. "[R]ights conferred by Congress to bring . . . actions in federal courts are not subject to abridgment by state-court injunctions." *Id.* at 17.

Ignoring *Harrison* completely, the Ninth Circuit's opinion summarily attempts to distinguish *Donovan* as not involving a "forum selection clause." (App. 8-9.) That distinction, however, is fully covered by the principles enunciated in *Donovan*: regardless of whether state law issues are argued to make a federal suit wrongful, groundless or subject to dismissal, it is the federal court that decides whether the federal suit can proceed; state courts cannot control this by injunctions, sanctions or other coercion. No difference in principle arises between a removal contended to be harassing under state law and a removal contended to violate a "forum selection clause" under state law.

Donovan states the general principle. *Harrison* refutes the Ninth Circuit's position specifically as to removal:

> [W]hen an issue of whether a prayer for removal was rightfully asked arises, a Federal question results which is determinable by the courts of the

> United States free from limitation or interference arising from an exertion of state power.

232 U.S. at 329.

The Ninth Circuit opinion, ignoring or oblivious to all these authorities, rules that a state court using state law can and should decide whether the removal of the Fraudulent Inducement Case was proper and may decide whether to enjoin, fine, sanction and award damages against a party who removed a case if the state court determines that the removal was improper. Uncorrected, the holding will engender state court interference with federal removal utterly inconsistent with the jurisprudence clearly established by this Court in *Harrison*, *Donovan* and the other decisions cited above.

Indeed, Plaintiffs now contend that, under the Ninth Circuit's opinion, a state court can and should decide whether DuPont must dismiss federal court suits DuPont has pending against Plaintiffs alleging that Plaintiffs breached their settlement agreements when they sued DuPont. Plaintiffs say that an "interpretation by the *state* court of the meaning and effect of that forum selection agreement is potentially dispositive regarding DuPont's ability to continue prosecution of claims against these parties *in federal court*." (App. 120.) (emphasis added). In other words, although the district court has ruled that DuPont's federal suits may proceed (App. 19-24), Plaintiffs cite the Ninth Circuit's opinion as authority for a state court to disagree with that determination and order DuPont not to proceed in federal court. This is but the beginning of the havoc the Ninth Circuit opinion will wreak if it is not corrected.

Diversity and federal question jurisdiction, both embodied in our Constitution (Art. 3, § 2), protect

fundamental federal policies. As to diversity jurisdiction, *Gordon v. Longest*, 41 U.S. 97, 104 (1842), explains:

> One great object in the establishment of the courts of the United States and regulating their jurisdiction was, to have a tribunal in each state, presumed to be free from local influence; and to which all who were non-residents or aliens might resort for legal redress. But this object would be defeated, if a state judge, in the exercise of his discretion, may deny to the party entitled to it, a removal of his cause.

Similarly, regarding federal question jurisdiction:

> The primary purpose of the 1875 grant of federal question jurisdiction is to ensure the availability of a forum designated to minimize the danger of hostility toward, and specially suited to the vindication of, federally created rights.

15 James Wm. Moore, *et al.*, Moore's Federal Practice § 103.03 at 103-7 to 103-8 (3d ed. 1999). *See also* Jack H. Friedenthal, *et al.*, Civil Procedure § 2.11 at 55 (2d ed. 1993) ("In a case involving a claim raising an issue of federal law, removal equalizes the ability of both parties to have a federal question litigated in its 'natural' forum.")

Consider the impact that the Ninth Circuit's rule would have on the federal system when federal courts sought to protect the federal rights[5] of a party whose position was unpopular and

5. These could be federal question rights, or they could be a party's right to proceed in federal court in a diversity case.

not adequately protected in a state's courts: When the threatened, unpopular party removed an action to federal court to escape the state bias, even if the removal was proper, the Plaintiffs could bring a "wrongful removal" case in state court against the unpopular party — seeking damages or even an injunction or imprisonment. Closing the doors of the federal court to such claims would expose that defendant to the very victimization removal is intended to prevent. This is precisely the type of situation this Court's decisions have consistently rejected and remedied.

In not allowing removal of the "wrongful removal" case, the Ninth Circuit says that Plaintiffs' Wrongful Removal Cases raise "a plausible claim under Hawaii law" and that the "merits of their claim . . . should have been decided by the courts of Hawaii." (App. 8.) The Ninth Circuit would leave a defendant to face the state court suit seeking damages and sanctions for "wrongful removal." This rule would apply even if the plaintiffs were attempting to suppress and intimidate a defendant and a state court was sympathetic to the plaintiffs. The Ninth Circuit should not be allowed to encroach, consciously or unconsciously, upon the federal system's clear ability to provide effectively, whenever it is needed, the protections envisioned by the Constitution's federal jurisdiction clauses.

The Ninth Circuit's rule also would create inappropriate variations from state to state, in contrast to the uniform interpretation and application of removal practice required under this Court's decisions:

> The removal statute which is nationwide in its operation, was intended to be uniform in its application, unaffected by local law definition or characterization of the subject matter to which it is to be applied. Hence the Act of Congress must be

> construed as setting up its own criteria, irrespective of local law, for determining in what instances suits are to be removed from the state to the federal courts.

Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 104 (1941). *See also Grubbs v. General Elec. Credit Corp.*, 405 U.S. 699, 705 (1972) ("the removal statutes and decisions of this Court are intended to have uniform nationwide application").

The Ninth Circuit's opinion would replace the federal interest in and the uniformity of the removal statutes with a scheme dependent upon the laws of the state where the action was brought. Federal removal law and procedure no longer would be determined by the federal courts, but rather would be second-guessed, sanctioned and thus significantly controlled by the rulings of state courts and state tort law — contrary to *Harrison*'s clear holding that the right to removal must be "unchecked or unburdened by state authority" and that "states are . . . without authority to penalize or punish . . . removal on the ground that the removal asked was unauthorized or illegal." 232 U.S. at 328-29.[6]

Federal courts, not state courts, need to decide whether to allow successive, separate actions seeking to restrain or sanction the removal of a prior case, or whether instead to require that any such contentions and claims be brought as a part of the removed case, under 28 U.S.C. § 1447(c), Federal Rule of Civil Procedure 11 or other appropriate vehicles.

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6. The Ninth Circuit itself understood these concepts in an analogous situation. *MSR Exploration Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910 (9th Cir. 1996) (bankruptcy debtor's state law malicious prosecution action against a creditor for pursuing allegedly frivolous claims in a bankruptcy proceeding is completely preempted by bankruptcy statutes).

The Ninth Circuit has designated its opinion "unpublished." Such a designation does not prevent the opinion from working substantial mischief, with potentially far-reaching ramifications.[7] The opinion can and undoubtedly will be cited in other circuits. It also will be cited to state courts when they are presented with the spate of independent state lawsuits challenging removals (and even challenging suits originally brought in federal court) that will be engendered by the opinion.

This Court should therefore not permit the Ninth Circuit's opinion to stand.

2. Whether a removal violated a clause contended to preclude removal is always a federal question essential to the cause of action, because, in a removed case, federal law governs the construction of a such a clause

As shown in Section 1, federal question jurisdiction over a wrongful removal suit does not depend on whether state or federal law controls the construction of a clause contended to preclude removal, because federal courts using federal law must decide if there is a separate cause of action for wrongful removal and, if so, what its elements are, whether they have been met in a particular case and what relief is proper. However, the Ninth Circuit's opinion is additionally erroneous because the construction of a clause contended to preclude removal is itself a federal question.

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7. Ninth Circuit Rule 36-3 only provides that the disposition "shall not be cited to or by this [Ninth Circuit] Court or any district court of the Ninth Circuit," and the rule makes exceptions "when relevant under the doctrines of law of the case, res judicata, or collateral estoppel."

When a federal court construes the clause in deciding whether to remand, federal procedural law governs the construction of the clause. This was the rule in the Ninth Circuit. *Docksider, Ltd. v. Sea Tech. Ltd.*, 875 F.2d 762 (9th Cir. 1989) (applies federal law in diversity action to enforce a contractual forum selection clause requiring case to be brought in state rather than federal court). *See also Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 513 (9th Cir. 1988) (applies federal law in diversity action to enforce forum selection clause designating foreign forum). It is also the rule in the Second, Third, Fourth, Fifth, Tenth and Eleventh Circuits.[8] These cases recognize as paramount the protection of the right to invoke federal jurisdiction and the need for consistent construction of clauses alleged to waive that right. These cases rely on related decisions by this Court[9] but recognize that this Court has never directly ruled on this exact issue.[10]

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8. *Florida Polk County v. Prison Health Serv., Inc.*, 170 F.3d 1081 (11th Cir. 1999) (federal procedural law governs federal court's construction of clauses argued to confine a case to a state rather than federal court); *Milk 'n 'More, Inc. v. Beavert*, 963 F.2d 1342 (10th Cir. 1992) (same); *Jones v. Weibrecht*, 901 F.2d 17 (2d Cir. 1990) (same); *Seward v. Devine*, 888 F.2d 957 (2d Cir. 1989) (same); *Luce v. Edelstein*, 802 F.2d 49 (2d Cir. 1986) (same); *Bryant Elec. Co. v. City of Fredericksburg*, 762 F.2d 1192 (4th Cir. 1985) (federal procedural law governs federal court's construction of clauses argued to confine a case to a state rather than federal court). *See also International Software Sys., Inc. v. Amplicon, Inc.*, 77 F.3d 112 (5th Cir. 1996) (same); *Jumara v. State Farm Ins. Co.*, 55 F.3d 873 (3d Cir. 1994) (federal procedural law governs federal court's construction of clause specifying geographic location for suit).

9. *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988) (federal law controls motion to transfer venue under (Cont'd)

Only a federal court can decide whether a removed case will be remanded. 28 U.S.C. § 1446(d) expressly provides that "the State court shall proceed no further unless and until the case is remanded" upon notice of removal, so the state court cannot determine whether a forum provision precludes removal. The authorities cited in Section 1 confirm that the

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(Cont'd)
28 U.S.C. § 1404(a) when venue was designated in a contractual forum selection clause); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 518-19 (1974) (federal standard adopted in *Bremen* applies to contractual agreement to arbitrate disputes before the International Chamber of Commerce in Paris); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (in an admiralty case enforcement of forum selection clause involving an international contract governed by federal law); *Hanna v. Plumer*, 380 U.S. 460, 471 (1965) (manner of service of process in a diversity action is governed by the Federal Rules of Civil Procedure, not state law); *Byrd v. Blue Ridge Rural Elec. Co-op., Inc.*, 356 U.S. 525 (1958) (federal practice of jury determination of disputed factual issues in a diversity action should not yield to the state rule requiring the judge to decide factual issues).

10. The First, Sixth, Seventh and D.C. Circuits have not decided that federal law controls, but none of these circuits have held that state law would control in contravention of federal law, and they generally acknowledge the majority position. *See, e.g., Security Watch, Inc. v. Sentinel Sys. Inc.*, 176 F.3d 369, 375 (6th Cir. 1999), *cert. denied*, 68 U.S.L.W. 3291 (U.S. Feb. 22, 2000) (no. 99-669); *Baker v. LeBoeuf, Lamb, Leiby & Macrae*, 105 F.3d 1102, 1105 (6th Cir. 1996); *Lambert v. Kysar*, 983 F.2d 1110, 1117 n.10 (1st Cir. 1993); *Royal Bed & Spring Co. v. Famossul Industria e Comercio de Moveis Ltda.*, 906 F.2d 45, 49 (1st Cir. 1990); *Northwestern Nat'l Ins. Co. v. Donovan*, 916 F.2d 372, 374 (7th Cir. 1990). There is uncertainty as to the Eight Circuit's approach. *See Farmland Indus., Inc. v. Frazier-Parrott Commodities, Inc.*, 806 F.2d 848 (8th Cir. 1986); *Sun World Lines, Ltd. v. March Shipping Corp.*, 801 F.2d 1066 (8th Cir. 1986).

federal court, not a state court, determines if removal is proper.

Therefore, a federal court will always be the court making the controlling determination as to whether a contractual or judicial specification of state court jurisdiction waives the right to remove a case to federal court. The federal court will make that determination applying federal procedural law.

An element of a wrongful removal cause of action — if such a cause of action exists — obviously is whether the removal was wrongful. Whether removal was wrongful, including the construction of any clause contended to preclude removal, is always and consistently controlled by federal procedural law under the majority view. Thus, even though the construction of a forum selection clause can in the abstract theoretically be a state law question, it can never be a state law question in the context of removal. In the context of determining whether removal was proper, the construction of the clause will always be a federal question decided by a federal court.

At first blush, one might ask how federal procedural law can control the substantive element of a cause of action. The reason is that the cause of action is based on an alleged procedural violation. Procedural law therefore has to govern whether there was a procedural violation.

The consequence is that an essential element of any cause of action for wrongful removal is controlled by federal law, thereby creating federal question jurisdiction. As used in 28 U.S.C. § 1331, a case arises under federal law when "the plaintiff's right to relief necessarily depends on resolution

of a substantial question of federal law." *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 27-28 (1983). This rule is satisfied where federal law is "an element, and an essential one, of the plaintiff's cause of action." *Gully v. First Nat'l Bank of Meridian*, 299 U.S. 109, 112 (1936). A claim may involve an "essential element" of federal law "even though state law creates a party's cause of action." *City of Chicago v. International College of Surgeons*, 118 S. Ct. 523, 529 (1997). This is, of course, entirely consistent with *Harrison*'s holding that any claim of improper removal — whatever its basis — presents "a Federal question." 232 U.S. at 329.

The Ninth Circuit opinion ignores this necessary impact of federal law on any wrongful removal case. In saying that the construction and enforcement of a retention of jurisdiction provision in a settlement agreement approved by an order of a state court are questions of state law, the Ninth Circuit disregards the context. The case cited by the Ninth Circuit, *Jeff D. v. Andrus*, 899 F.2d 753, 759 (9th Cir. 1990), not only did not involve removal but did not even involve a forum selection clause or retention of jurisdiction provision. Obviously, the construction of a settlement agreement is usually a matter of state law. Similarly, the construction of a jurisdiction clause may be a matter of state law when a state court is the forum making the procedural determination. But the Ninth Circuit does not deal with the fact that federal courts must make removal determinations and in doing so use federal procedural law to construe jurisdiction clauses.

The Ninth Circuit cites *Docksider, Ltd. v. Sea Technology, Ltd.*, 875 F.2d 762, 763-64 (9th Cir. 1989), for the proposition that the right to remove may be waived by a forum selection clause. (App. 8.) Putting aside the fact that

Docksider did not involve removal but dealt with a case originally filed in the district court, *Docksider* did so hold. The critical point missed by the Ninth Circuit opinion is that, in *Docksider*, it was a *federal court* that decided the effect of the forum selection clause on its jurisdiction, and the federal court did so using *federal law* to analyze the issue and to construe the clause. There is not a state case or law cited in *Docksider*.

Here, the district court did construe the clause, citing and using federal law just as directed by *Docksider* and *Manetti-Farrow* (which the district court cited). The district court found that the clause was not mandatory and did not preclude removal.[11] The district court did not award sanctions in remanding the Fraudulent Inducement Case for lack of diversity jurisdiction. (App. 30-45.) However, under the Ninth Circuit's rule, the state court remains free to construe the clause contrary to the district court and will be asked to consider sanctions for the removal despite the district court having found them inappropriate. This cannot be good law.

In terms of power and protection of federal rights, granting states the power to penalize removal through "construction" of contracts is no less an encroachment on the federal interests than the encroachments disapproved in *Harrison* and this Court's related cases. For example, if state law controls construction, then a state legislature could require all contracts to be construed as containing an implied

11. The district court's conclusory finding to this effect in the Wrongful Removal Cases is at page App. 17 of the Appendix, where the court references its explanation to an order entered the related case DuPont brought against Plaintiffs asserting DuPont's claims for these Plaintiffs' breach of the settlement agreement. That order is at pages App. 19-24 of the Appendix, particularly pages App. 22-24.

agreement not to remove, enforceable by damages and injunction.

This Court should confirm that, when a federal court is presented with a forum selection or similar clause that is contended to prevent the action from proceeding in federal court, the clause is to be construed using federal procedural law. Construing a clause to preclude removal is an essential element of any wrongful removal suit based on the clause. The consequence of recognizing that essential element to be a federal question is that it then follows that the wrongful removal case arises under federal law for federal jurisdiction purposes.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be granted, and this Court should direct the Ninth Circuit to apply federal law to determine whether the district court correctly dismissed the Wrongful Removal Cases with prejudice — a determination that will include deciding, under federal law, whether a cause of action exists for alleged wrongful removal of another case and whether the Plaintiffs' Wrongful Removal Cases were sustainable.

Were the Court to consider the Ninth Circuit's opinion to be manifestly and clearly out of line with this Court's prior cases and with established removal and federal jurisdiction jurisprudence, it would still be important to correct that error, and the Court could consider summary reversal as a means to effectuate that correction.

Respectfully submitted,

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APPENDIX

APPENDIX A — 9th Cir. ["Wrongful Removal Cases"]: MEMORANDUM DISPOSITION DECIDED SEPTEMBER 9, 1999

Sharon MURAKAMI and Harvey Tomono,

Plaintiffs — Appellants,

v.

E.I. DUPONT DE NEMOURS AND COMPANY, and Goodsill Anderson Quinn & Stifel,

Defendants — Appellees.

Sharon MURAKAMI and Harvey Tomono

Petitioners — Appellants,

v.

E.I. DUPONT DE NEMOURS & CO., INC., a Delaware corporation, and Goodsill, Anderson, Quinn & Stifel,

Respondents — Appellees.

Nos. 98-15994, 98-16019.
D.C. Nos. CV-97-01352-DAE, CV-97-01180-DAE.

United States Court of Appeals, Ninth Circuit.
Argued and Submitted June 15, 1999.

Decided Sept. 9, 1999.

Appendix A

Consolidated appeals from the United States District Court for the District of Hawaii, David A. Ezra, District Judge, Presiding.

Before SCHROEDER, B. FLETCHER, and BOOCHEVER, Circuit Judges.

MEMORANDUM[1]

Plaintiffs Sharon Murakami and Harvey Tomono appeal from a district court order dismissing with prejudice their motions seeking a contempt order, an injunction, a temporary restraining order, and sanctions to prevent DuPont from removing claims against Dupont to federal court.[2] Plaintiffs allege that the district court lacked jurisdiction to enter the order because the presence of a Hawaii defendant — DuPont's Hawaii counsel — destroyed diversity jurisdiction. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we reverse. We conclude that the Hawaii defendant was not joined fraudulently, and absent complete diversity, the district court lacked subject matter jurisdiction.

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1. This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

2. This case is an uncertified class action and was originally captioned Kato and Tomono v. DuPont and Goodsill, Anderson, Quinn & Stifel. After Kato died, Murakami became the named class representative and the case was renamed.

Appendix A

BACKGROUND

This procedurally complex case involves five interrelated cases, two of which are consolidated in this appeal. The cases arise out of plaintiffs' claims that DuPont concealed evidence that its fungicide, Benlate, was contaminated, and that DuPont had fraudulently induced plaintiffs to settle their product liability claims for less than fair value.

In the early 1990s, commercial growers and nurseries around the country sued DuPont for damages arising out of the use of contaminated Benlate. Plaintiffs in this case are commercial growers and nurseries in Hawaii whose plants allegedly had been damaged or destroyed by the contaminated Benlate. In 1994, before DuPont's discovery fraud was uncovered, plaintiffs voluntarily settled their Benlate product liability claims and dismissed their complaint against DuPont. A "Stipulation of Dismissal," signed by plaintiffs and DuPont's Hawaii counsel, Goodsill Anderson Quinn & Stifel ("Goodsill"), and approved by the Third Circuit Court of the State of Hawaii, contained a forum selection clause that specified:

> [T]his Court shall retain jurisdiction to resolve any disputes amongst the parties relating to this action, including, but not limited to, disputes arising out of its settlement.

After the parties settled, courts hearing Benlate cases in several jurisdictions uncovered evidence that DuPont had systematically concealed "smoking gun" evidence in Benlate

cases around the country.[3] In 1997, plaintiffs, like similarly situated Benlate plaintiffs suing in other jurisdictions, sued DuPont and Benlate distributers in Hawaii state court in 1997, alleging that DuPont had fraudulently concealed evidence and induced them to settle their claims for less than fair market value.[4] DuPont removed the fraudulent inducement claim to federal court, but it was later remanded for lack of complete diversity and is pending in state court.[5]

Plaintiffs then sought, in Hawaii state court, an order to show cause why DuPont and Goodsill, its local counsel,

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3. The Hawaii plaintiffs that went to trial won a multi-million dollar verdict against DuPont, and helped expose DuPont's widespread concealment of evidence in the Benlate cases. See Kawamata Farms, Inc. v. United Agri Products and E.I. DuPont, 86 Haw. 214 (1997). The discovery in plaintiffs' product liability action was consolidated with discovery in the Kawamata case.

4. DuPont, in a counterclaim, argued that a release signed by the plaintiffs as part of their settlement agreement, barred their fraudulent inducement action. However, this court has twice rejected that argument. See Fuku-Bonsai, Inc. v. E.I. DuPont de Nemours and Co., No. 98-15429, 1999 WL 599218 (9th Cir. Aug. 11, 1999), and Matsuura v. Alston & Bird and E.I. DuPont de Nemours and Co., 166 F.3d 1006 (9th Cir.1999) (per curiam). DuPont has also filed its own action against plaintiffs in federal court alleging that plaintiffs had breached their release in the product liability action by bringing the class action against DuPont. This claim mirrors DuPont's counterclaim in the underlying class action. That case is pending in federal court and is not before us.

5. In that case, one of the Benlate distributors was a Hawaii corporation. Goodsill is not a party to that case.

should not be held in contempt for removing the fraudulent inducement action to federal court in violation of the jurisdiction clause in the parties' Stipulation of Dismissal. Plaintiffs also sought an injunction to prevent DuPont from litigating future claims in federal court, a temporary restraining order,[6] and sanctions against DuPont and Goodsill for consistently removing plaintiffs' actions in violation of the jurisdiction clause. The parties call these various proceedings the "Special Proceedings."

In the Special Proceedings, plaintiffs allege that the forum selection clause in the "Stipulation of Dismissal" preserved exclusive jurisdiction in the Third Circuit Court of Hawaii for their fraudulent inducement claim and that DuPont and Goodsill violated that Stipulation by removing that case to federal court.

DuPont then removed the Special Proceedings to federal court, on the theory that Goodsill had been fraudulently joined. Plaintiffs opposed the removal, arguing that the district court lacked jurisdiction because the presence of Goodsill, a Hawaii resident, destroyed complete diversity. The district court initially concluded that the Special Proceedings were moot after the court remanded the fraudulent inducement action to state court. In response to plaintiffs' motion to dismiss the Special Proceedings without prejudice, however, the district court not only concluded that it had jurisdiction because Goodsill was fraudulently joined, but it dismissed the claims with prejudice, finding the forum selection clause permissive, not mandatory. It is that decision that is appealed to us.

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6. The district court denied the TRO.

Appendix A

ANALYSIS

The threshold question we confront is jurisdictional. Plaintiffs are citizens of Hawaii, as is DuPont's Hawaii Counsel, Goodsill Anderson Quinn & Stifel. DuPont insists, and the district court agreed, that Goodsill was fraudulently joined and thus its presence did not destroy diversity jurisdiction.

We review de novo the issue of subject matter jurisdiction. Ritchey v. Upjohn Drug Co., 139 F.3d 1313 (9th Cir.1998). Federal district courts have original jurisdiction over cases between citizens of different states. See 28 U.S.C. § 1332(a). The defendant or defendants may remove such an action to federal court provided that no defendant is a citizen of the state in which the action was brought. See 28 U.S.C. § 1441(a), (b). However, the district court must remand a case where diversity jurisdiction is absent if the action does not also raise a federal question. See 28 U.S.C. § 1447(c). Because plaintiffs are citizens of Hawaii, and defendant Goodsill is a Hawaii resident, diversity jurisdiction is lacking unless the law firm was fraudulently joined.[7]

The defendant has the burden of proving that the requisite jurisdiction exists to support removal. Gaus v. Miles, 980 F.2d 564, 566 (9th Cir.1992). When a case is removed to federal court, there is a strong presumption against federal jurisdiction. Id. We have held that

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7. We reject DuPont's attempt to convert the issues into federal questions. They are all issues of state law.

"[f]raudulent joinder is a term of art." McCabe v. General Foods Corp., 811 F.2d 1336, 1339 (9th Cir.1987). The defendant bears the burden of proving that the plaintiff failed to state a cause of action against the resident defendant who would otherwise destroy diversity, and that "the failure is obvious according to settled law of the state." Id. (emphasis added). Where a defendant proves fraudulent joinder, the presence of a resident defendant will not defeat diversity jurisdiction and a remand on jurisdictional grounds is not required.

Where, as here, fraudulent joinder is an issue, the court may go outside the pleadings, and the defendant may present facts showing that the joinder is fraudulent. Ritchey, 139 F.3d at 1318. However, there is a distinction between a complete lack of a cause of action against a sham defendant and an "inquiry as to whether those defendants could propound defenses to an otherwise valid cause of action." Id. A finding of fraudulent joinder is improper if the defendant's assertions go to "the merits of the action as an entirety, and not to the joinder; that is to say, it indicated that the plaintiff's case was ill founded as to all the defendants." Id. (quoting Chesapeake & Ohio Ry Co. v. Cockrell, 232 U.S. 146, 153-54 (1914)).

The district court misapplied the test for fraudulent joinder. The issue is not, as the district court believed, that Goodsill had a statutory right to remove the case to federal court that deprived plaintiffs of a viable claim against Goodsill. Rather, the issue is whether plaintiffs' complaint put forward any viable theory that could impose liability against Goodsill for its conduct in removing the actions in

light of the jurisdiction clause in the settlement agreement that, arguably, preserved exclusive jurisdiction in the Hawaii state court. The test for fraudulent joinder requires the court to determine whether the plaintiff failed to state a claim against the resident defendant under the settled law of the state. See McCabe, 811 F.2d at 1339. Although defendants may have a statutory right to remove a case under 28 U.S.C. § 1441(a), that right may be waived by a valid, mandatory forum selection clause. See Docksider, Ltd. v. Sea Technology, 875 F.2d 762, 763-64 (9th Cir.1989).[8]

Because a forum selection clause may bar federal jurisdiction, plaintiffs have raised a plausible claim under Hawaii law that withstands the test for fraudulent joinder. The merits of their claim, including whether the Stipulation applied at all or whether it was permissive or mandatory, should have been decided by the courts of Hawaii. Under Hawaii law, "[a] compromise and settlement should be construed to include only those matters the parties intended to include; it should not be construed to extend to other matters." Wiginton v. Pacific Credit Corp., 634 P.2d 111, 117 (Haw.Ct.App.1981). We cannot conclude that plaintiffs' action obviously failed to state a claim against Goodsill. Defendants' reliance on Donovan v. City of Dallas, 377 U.S. 408 (1964) for the proposition that a state court may not enjoin a litigant from proceeding in federal court is

8. Section 1447(c) does not, as the district court stated, confer any "statutory right" to removal. It requires a district court to remand a case over which it lacks subject matter jurisdiction. See 28 U.S.C. § 1447(c). The district court probably intended to refer to 28 U.S.C. § 1441(a).

inapposite. Donovan does not involve the effect of a contractual forum selection clause.

We conclude that defendants have not met their burden of proving fraudulent joinder. The presence of a Hawaii plaintiff and a legitimate Hawaii defendant destroyed diversity jurisdiction and deprived the district court of subject matter jurisdiction to render a decision on the merits.[9]

REVERSED AND REMANDED with instructions to dismiss without prejudice.

9. A district court order remanding a case for lack of subject matter jurisdiction is unreviewable. See 28 U.S.C. § 1447(d).

APPENDIX B — 9th Cir. ["Wrongful Removal Cases"]: ORDER DENYING PETITION FOR REHEARING AND MODIFYING MEMORANDUM DISPOSITION DATED DECEMBER 3, 1999

Sharon MURAKAMI and Harvey Tomono,

Plaintiffs — Appellants,

v.

E.I. DUPONT DE NEMOURS AND COMPANY, and Goodsill Anderson Quinn & Stifel,

Defendants — Appellees.

Sharon MURAKAMI and Harvey Tomono

Petitioners — Appellants,

v.

E.I. DUPONT DE NEMOURS & CO., INC., a Delaware corporation, and Goodsill, Anderson, Quinn & Stifel,

Respondents — Appellees.

Nos. 98-15994, 98-16019.
D.C. Nos. CV-97-01352-DAE, CV-97-01180-DAE.

United States Court of Appeals, Ninth Circuit.
Dec. 3, 1999.

Appendix B

Before SCHROEDER, B. FLETCHER, and BOOCHEVER, Circuit Judges.

ORDER

All judges vote to deny the petition for rehearing. Judge Schroeder votes to reject the petition for rehearing en banc and Judges Fletcher and Boochever so recommend. The judges all concur in the following amendment to the Memorandum Disposition. Footnote 7 on page 6 is replaced with the following:

> We reject DuPont's attempt to invoke federal question jurisdiction. On the merits, this case involves a dispute over the scope and interpretation of a retention of jurisdiction provision in a settlement agreement approved by an order of a state court. The construction and enforcement of such an order are questions of state law. See Jeff D. v. Andrus, 899 F.2d 753, 759 (9th Cir.1990).

With that change the petition for rehearing and rehearing en banc are denied. The panel declines to publish.

APPENDIX C — D. Haw. ["Wrongful Removal Cases"]: ORDER DENYING PLAINTIFFS' MOTION TO DISMISS WITHOUT PREJUDICE AND ORDERING DISMISSAL WITH PREJUDICE FILED APRIL 23, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CV. NO. 97-01180 DAE
CV. NO. 97-01352 DAE

CHIAKI KATO and HARVEY TOMONO,

Plaintiffs/Petitioners,

vs.

E.I. du PONT de NEMOURS and COMPANY, a Delaware Corporation, and GOODSILL ANDERSON QUINN & STIFEL, a law partnership,

Defendants/Respondents.

ORDER DENYING PLAINTIFFS' MOTION TO DISMISS WITHOUT PREJUDICE; ORDERING THE DISMISSAL WITH PREJUDICE OF CIVIL NO. 97-01180 DAE AND CIVIL NO. 97-01352 DAE

The court heard Plaintiffs' Motion on April 20, 1998. Melvin Y. Agena, Esq., appeared at the hearing on behalf of Plaintiffs; Stephen Clay, Esq., appeared at the hearing on behalf of Defendants. After reviewing the motion and the supporting and opposing memoranda, the court DENIES

Appendix C

Plaintiffs' Motion to Dismiss Without Prejudice and orders the dismissal WITH PREJUDICE of Civil No. 97-01180 DAE and Civil No. 97-01352 DAE.

BACKGROUND

On May 9, 1997, Plaintiffs Chiaki Kato and Harvey Tomono ("Plaintiffs") filed a lawsuit against E.I. du Pont de Nemours and Company ("DuPont"), Allen Teshima and Reginald Hasegawa in the Circuit Court for the Third Circuit, State of Hawaii (hereinafter referred to as the "*Exotics* case"). On June 9, 1997, Defendants DuPont and Teshima removed the *Exotics* case to the United States District Court for the District of Hawaii. While this case was pending in federal court, Plaintiffs filed two "special proceedings" in the Circuit Court for the Third Circuit, State of Hawaii against DuPont and its Hawaii counsel, Goodsill Anderson Quinn & Stifel ("Goodsill"). In these proceedings, Plaintiffs were seeking sanctions against DuPont and Goodsill for removing the *Exotics* case to federal court. Plaintiffs allege that this removal was in violation of a stipulation of dismissal signed between Plaintiffs and DuPont on October 28, 1994.

DuPont removed the special proceedings to federal court on September 5, 1997, and September 18, 1997. On October 22, 1997, Plaintiffs filed a motion to remand these cases to state court. On January 7, 1998, the court issued an order denying as moot Plaintiffs' motion to remand. In the order, the court explained that the motions were moot in light of the court's January 7, 1998 order remanding the *Exotics* case to state court.

Appendix C

On February 5, 1998, Plaintiffs filed a motion in the remanded *Exotics* case, seeking contempt sanctions against DuPont for removing the *Exotics* case to federal court. In this motion, Plaintiffs are asserting essentially the same claims they raised in the special proceedings.

On February 10, 1998, Plaintiffs filed the instant motions to dismiss the special proceedings *without* prejudice. In these motions, Plaintiffs contend that the special proceedings should be dismissed without prejudice because they are duplicative of the February 5, 1998 motion filed by Plaintiffs in the remanded *Exotics* case. On April 2, 1998, DuPont and Goodsill filed a memorandum in opposition to Plaintiffs' motion, arguing that the special proceedings should be dismissed *with* prejudice.

DISCUSSION

I. Jurisdiction

The court has diversity jurisdiction over Civil Nos. 97-01180 DAE and 97-01352 DAE (hereinafter referred to as the "special proceedings") pursuant to 28 U.S.C. Section 1332. Although DuPont's Hawaii counsel, Goodsill Anderson Quinn Stifel ("Goodsill"), is named as a defendant in this case, the court finds that said Defendant was fraudulently joined in this lawsuit. In the special proceedings, Plaintiffs are seeking sanctions against Goodsill for removing the *Exotics* case to federal court. However, under 28 U.S.C. Section 1447(c), Goodsill had the statutory right to remove this case to federal court. Goodsill's removal of the *Exotics* case was not clearly meritless or outside the color of the

law, thus there is no basis for awarding sanctions against Goodsill. Accordingly, because Plaintiffs do not have a viable claim against Goodsill, Goodsill's presence in this lawsuit does not destroy diversity jurisdiction. The court therefore concludes that it has diversity jurisdiction over the special proceedings.

II. Plaintiffs' Motion to Dismiss Without Prejudice

On February 10, 1998, Plaintiffs filed a motion to dismiss the special proceedings without prejudice. Although Defendants have already filed an answer in these cases, the court still has discretion to grant Plaintiffs' motion under Rule 41(a)(2) of the Federal Rules of Civil Procedure. A motion under Rule 41(a)(2) is addressed to the discretion of the court and may be granted "upon such terms and conditions as the court deems proper." Fed. R. Civ. P. 41(a)(2). "In exercising its discretion, the Court must make three separate determinations: (1) whether to allow the dismissal at all; (2) whether the dismissal should be with or without prejudice; and (3) what terms and conditions, if any, should be imposed." *Burnette v. Godshall*, 828 F. Supp. 1439, 1443 (N.D. Cal. 1993).

"In determining whether to allow dismissal, the Court is to consider whether doing so will unfairly affect the other side. Thus, courts generally allow dismissal unless defendant will suffer 'some legal prejudice.' However, plain legal prejudice does not result merely because defendant will be inconvenienced by having to defend in another forum. Nor does it result when the dismissal may cause defendant to incur substantial expense in preparing for trial. The court

may dismiss the claim even where plaintiff would gain a tactical advantage thereby." *Id.*; *see also Westlands Water Dist. v. United States*, 100 F.3d 94, 97 (9th Cir. 1996). Finally, legal prejudice does not "arise from defendant's missed opportunity for a legal ruling on the merits." *Watson v. Clark*, 716 F. Supp. 1354, 1355 (D. Nev. 1989).

In this case, Defendants will not suffer any legal prejudice if the special proceedings are dismissed. Defendants have not filed any counterclaim in this action, nor have they requested any affirmative relief. Accordingly, the court finds that the special proceedings should be dismissed.

The next issue is whether these cases should be dismissed with or without prejudice. "Whether to allow dismissal with or without prejudice is discretionary with the court, and [the court] may order the dismissal to be with prejudice where it would be inequitable or prejudicial to defendant to allow plaintiff to refile the action. The following factors are relevant in determining whether the dismissal should be with or without prejudice: '(1) the defendant's effort and expense involved in preparing for trial, (2) excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action, [and] (3) insufficient explanation of the need to take a dismissal.' " *Burnette*, 828 F. Supp. at 1443-44 (citation omitted).

In this case, the court finds that the special proceedings should be dismissed with prejudice because the claims raised by Plaintiffs in these cases are without merit. In the special proceedings, Plaintiffs are seeking sanctions against DuPont

for removing the *Exotics* case to federal court. Plaintiffs contend that the removal violated the provisions of two stipulations signed between Plaintiffs and DuPont on October 28, 1994. As the court explained in its Order Denying Defendants' Motion to Dismiss for Lack of Personal Jurisdiction and Venue, Civil No. 97-01185 DAE, filed concurrently with this order,[*] these stipulations did not designate the Circuit Court for the Third Circuit, State of Hawaii, as the exclusive forum for the resolution of any disputes arising out of the parties' settlement agreements. The stipulations did not, therefore, prevent DuPont from litigating the *Exotics* case in federal court. Accordingly, the court has no authority to impose sanctions on DuPont for its removal of the *Exotics* case to federal court. Furthermore, because DuPont's removal of the *Exotics* case to federal court was not completely meritless or outside the color of law, the court finds that it would be inappropriate to award Plaintiffs costs and attorneys' fees under 28 U.S.C. Section 1447(c).[1] As the court finds that Plaintiffs' claims are without merit, the court DENIES Plaintiffs' Motion to Dismiss Without Prejudice and orders that Civil No. 97-01180 DAE and Civil No. 97-01352 DAE be dismissed WITH PREJUDICE.

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1. Additionally, the court notes for the record that there is no evidence which suggests that there is an appropriate basis for an award of sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure.

[* This order is Appendix D hereto.]

Appendix C

CONCLUSION

For the reasons stated above, the court DENIES Plaintiffs' Motion to Dismiss Without Prejudice and orders that Civil No. 97-01180 DAE and Civil No. 97-01352 DAE be dismissed WITH PREJUDICE.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, APR 23 1998.

s/ David Alan Ezra
DAVID ALAN EZRA
UNITED STATES DISTRICT JUDGE

APPENDIX D — D. Haw. ["DuPont's Separate Lawsuit Against Plaintiffs"]: ORDER DENYING DEFENDANT AND COUNTERPLAINTIFFS' MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION AND VENUE FILED APRIL 23, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CV. NO. 97-01185 DAE

E.I. du PONT de NEMOURS AND COMPANY,

Plaintiff/Counterdefendant,

vs.

EXOTICS HAWAII KONA, INC., CHIAKI KATO and HARVEY TOMONO,

Defendant/Counterplaintiffs.

ORDER DENYING DEFENDANT AND COUNTERPLAINTIFFS' MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION AND VENUE

The court heard Defendant and Counterplaintiffs' Motion on April 20, 1998. Stephen Clay, Esq., appeared at the hearing on behalf of Plaintiff; Melvin Y. Agena, Esq., appeared at the hearing on behalf of Defendants. After reviewing the motion and the supporting and opposing memoranda, the court DENIES Defendant and Counterplaintiffs' Motion to Dismiss for Lack of Personal Jurisdiction and Venue.

Appendix D

BACKGROUND

This lawsuit arises out of litigation which began in the Hawaii state courts in 1993. In the state court litigation, Defendants Exotics Hawaii Kona, Inc. ("Exotics"), Chiaki Kato ("Kato"), and Harvey Tomono ("Tomono") (collectively referred to as "Defendants") asserted claims against Plaintiff E.I. du Pont de Nemours and Company ("DuPont") for damages they allegedly suffered as a result of their use of Benlate, a fungicide manufactured by DuPont. On April 26, 1994, Exotics settled its lawsuit against DuPont for $1.4 million. On October 19, 1994, Kato and Tomono settled their lawsuits against DuPont for $500,000 and $600,000 respectively. Pursuant to the terms of the settlement agreements, Kato and Tomono dismissed their claims against DuPont with prejudice.

On May 9, 1997, Defendants filed a lawsuit against DuPont in the Circuit Court for the Third Circuit, State of Hawaii, alleging that DuPont wrongfully withheld material information from Defendants during the discovery process, thereby inducing Defendants to settle their claims with DuPont for "pennies on the dollar."[1]

On September 8, 1997, DuPont filed the instant lawsuit against Defendants, alleging that the Defendants breached

1. This lawsuit was subsequently removed by DuPont to federal court on June 9, 1997. Pursuant to the court's order dated January 7, 1998, the case was remanded to state court for lack of subject matter jurisdiction. On February 8, 1998, DuPont again removed the case to federal court. Defendants' Motion for Summary Remand is currently set for oral argument before this court on June 29, 1998.

their settlement agreements by filing their May 9, 1997 lawsuit against DuPont. On November 19, 1997, Defendants filed a motion to dismiss this lawsuit for lack of personal jurisdiction and improper venue. Defendants argue that pursuant to the terms of the settlement agreements signed between Plaintiff and Defendants, the Circuit Court for the Third Circuit, State of Hawaii, retained exclusive jurisdiction to hear any disputes arising out of the settlement agreements. Defendants therefore contend that by signing these settlement agreements, DuPont waived its right to litigate this case in federal court.

On January 30, 1998, DuPont filed a memorandum in opposition to Defendants' motion to dismiss. In this memorandum, DuPont argues that the language used in the settlement agreements is permissive, not mandatory. Defendants' position, therefore, is that the settlement agreements do not prevent the court from exercising jurisdiction over this case.

DISCUSSION

On October 28, 1994, Plaintiff DuPont and Defendants Kato and Tomono executed a Stipulation for Dismissal with Prejudice of All Claims and Parties ("Stipulation"). On November 21, 1994, Plaintiff DuPont and Defendant Exotics executed a Stipulation for Dismissal with Prejudice of All Claims and Parties ("Stipulation"). These stipulations contained the following language:

> It is further expressly stipulated and agreed by and between the parties that, notwithstanding the

> dismissal with prejudice of this action, this Court [the Circuit Court for the Third Circuit, State of Hawaii] shall retain jurisdiction to resolve any disputes amongst the parties relating to the action, including but not limited to disputes arising out of its settlement.

Stipulation, p. 2, attached as Exhibits 1 and 2 to Plaintiffs' Motion to Remand, filed October 22, 1997, in Civil No. 97-01352 DAE. Defendants contend that by signing these Stipulations, Plaintiff waived its right to litigate this case in federal court and is instead required to litigate all disputes arising out of the settlement agreements in the Circuit Court for the Third Circuit, State of Hawaii.

In diversity cases, federal law governs the interpretation of forum selection clauses. *See, e.g., Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509, 513 (9th Cir. 1988). When interpreting a forum selection clause, federal courts make a distinction between mandatory and permissive clauses. In a mandatory forum selection clause, the parties may waive their right to litigate a case in federal court. However, where the clause is merely permissive, the parties have the option of litigating their dispute in either state court or federal court.

For a forum selection clause to be mandatory, it "must contain language that clearly designates a forum as the exclusive one." *Northern California Dist. Council of Laborers v. Pittsburgh-Des Moines Steel Co.*, 69 F.3d 1034, 1037 (9th Cir. 1995). For example, in *Pelleport Investors, Inc. v. Budco Quality Theaters, Inc.*, 741 F.2d 273, 275

(9th Cir. 1984), the Ninth Circuit concluded that the forum selection clause was "mandatory" where it specified that "this Agreement shall be litigated only in the Superior Court for Los Angeles, California (and in no other) . . . ." In contrast, the Ninth Circuit found that the forum selection clause was only "permissive" where it stated that "the courts of California, Orange County, shall have jurisdiction over the parties in any action" arising out of the contract. *Hunt Wesson Foods, Inc. v. Supreme Oil Co.*, 817 F.2d 75, 76 (9th Cir. 1987).

In this case, the Stipulations did not specify that the state court retained *exclusive* jurisdiction to litigate any disputes arising out of the settlement agreements. Instead, the Stipulations provided that the state court "shall retain jurisdiction" over disputes arising out of the settlement agreement. This language is nearly identical to the language which the Ninth Circuit found to be permissive in *Hunt Wesson Foods*. *See Hunt Wesson Foods*, 817 F.2d at 76. Because this language is permissive, the parties are not required to litigate their dispute in state court.

In general, a contractual provision which specifies a particular venue will be strictly enforced. However, "[w]hen only jurisdiction is specified the clause will generally not be enforced without some further language indicating the parties' intent to make jurisdiction exclusive." *Docksider, Ltd. v. Sea Technologies, Ltd.*, 875 F.2d 762, 764 (9th Cir. 1989); *see also Talatala v. Nippon Yusen Kaisha Corp.*, 974 F. Supp. 1321, 1325 (D. Haw. 1997). "Affirmatively conferring . . . jurisdiction by consent does not negatively exclude any other proper jurisdiction." *Redondo Constr. Co. v. Banco Exterior de Espana, S.A.*, 11 F.3d 3, 5 (1st Cir. 1993).

Appendix D

Having examined the language of the Stipulations at issue in this case, the court finds that the language used in these Stipulations does not suggest that the parties intended that the Circuit Court for the Third Circuit, State of Hawaii, would retain exclusive jurisdiction over any dispute arising out of the settlement agreements. The Stipulations do not therefore deprive this court of personal jurisdiction over the Defendants, nor do they suggest that this court is an improper venue. Accordingly, Defendants' Motion to Dismiss for Lack of Personal Jurisdiction and Improper Venue is DENIED.

CONCLUSION

For the reasons stated above, the court DENIES Defendants' Motion to Dismiss for Lack of Personal Jurisdiction and Improper Venue.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, APR 23 1998.

s/ David Alan Ezra
DAVID ALAN EZRA
UNITED STATES DISTRICT JUDGE

APPENDIX E — D. Haw. ["Wrongful Removal Cases"]: ORDER DENYING AS MOOT PLAINTIFFS' MOTIONS TO REMAND FILED JANUARY 7, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CV. NO. 97-01180 DAE
CV. NO. 97-01352 DAE

CHIAKI KATO and HARVEY TOMONO,

Plaintiffs/Petitioners,

vs.

E.I. du PONT de NEMOURS and COMPANY, a Delaware Corporation, and GOODSILL ANDERSON QUINN & STIFEL, a law partnership,

Defendants/Respondents.

ORDER DENYING AS MOOT PLAINTIFFS' MOTIONS TO REMAND

The court heard Plaintiffs' Motions on January 5, 1998. Melvin Y. Agena, Esq., appeared at the hearing on behalf of Plaintiffs; A. Stephens Clay, Esq., appeared at the hearing on behalf of Defendants. After reviewing the motion and the supporting and opposing memoranda, the court DENIES AS MOOT Plaintiffs' Motions to Remand.

On January 7, 1998, the court issued an Order Granting Plaintiffs' Motion to Remand in *Exotics et al. v. Du Pont*

et al., Civil No. 97-00740 DAE. In light of the court's ruling in that case, the court DENIES AS MOOT Plaintiffs' Motions to Remand in Civil No. 97-01180 DAE and 97-01352 DAE.[*]

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, JAN 07 1998.

s/ David Alan Ezra
DAVID ALAN EZRA
UNITED STATES DISTRICT
JUDGE

[* This order is Appendix G hereto.]

APPENDIX F — D. Haw. ["Wrongful Removal Cases"]: ORDER CLARIFYING JANUARY 7, 1998 ORDER DENYING AS MOOT PLAINTIFFS' MOTIONS TO REMAND FILED FEBRUARY 2, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CV. NO. 97-01180 DAE
CV. NO. 97-01352 DAE

CHIAKI KATO and HARVEY TOMONO,

Plaintiffs/Petitioners,

vs.

E.I. du PONT de NEMOURS and COMPANY, a Delaware Corporation, and GOODSILL ANDERSON QUINN & STIFEL, a law partnership,

Defendants/Respondents.

ORDER CLARIFYING JANUARY 7, 1998 ORDER DENYING AS MOOT PLAINTIFFS' MOTIONS TO REMAND[*]

Pursuant to Local Rule 7.2(d), the court finds this matter suitable for disposition without a hearing. After reviewing Plaintiffs' motion and the supporting memoranda, the court issues this order clarifying the January 7, 1998 Order Denying as Moot Plaintiffs' Motion to Remand.

[* This order is Appendix E hereto.]

Appendix F

DISCUSSION

On January 7, 1998, the court issued an Order Denying as Moot Plaintiffs' Motion to Remand. On January 26, 1998, Plaintiffs filed a motion for clarification of the January 7 Order. On January 28, 1998, Plaintiffs filed a supplemental memorandum in support of their motion to clarify the January 7 Order. In their motions for clarification, Plaintiffs state that they are interpreting the court's January 7 Order as meaning that Civil No. 97-01180 DAE and Civil No. 97-01352 DAE should also be remanded because they are related matters. Plaintiffs contend, however, that by denying the motions to remand as moot, "there is no specific order of remand and the cases remain in federal court." Plaintiffs' Motion for Clarification, p. 2.

In the January 7 Order, the court denied as moot Plaintiffs' motions to remand in Civil No. 97-01180 DAE and Civil No. 97-01352 DAE based on the fact that the court had granted Plaintiffs' motion to remand in *Exotics et al. v. Du Pont et al.*, Civil No. 97-00740 DAE ("*Exotics*").[*] The court found that these motions to remand were moot because in both of those cases, Plaintiffs were attempting to stop this court from exercising federal jurisdiction over the *Exotics* case. In Civil No. 97-01180 DAE, Plaintiffs were attempting to hold Defendants in contempt of court for removing the *Exotics* case to federal court. Plaintiffs were also seeking a preliminary and permanent injunction to enjoin Defendants from prosecuting or defending any claims in federal court. In Civil No. 97-01352 DAE, Plaintiffs were seeking a

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[* This order is Appendix G hereto.]

temporary restraining order to enjoin the Defendants from proceeding with the *Exotics* case in federal court. In light of the fact that the court had ordered that the *Exotics* case be remanded to federal court, the court concluded that the claims asserted by Plaintiffs in Civil No. 97-01180 DAE and Civil No. 97-01352 DAE were moot. Accordingly, the court denied as moot, Plaintiffs' Motions to Remand.

CONCLUSION

For the reasons stated above, the court issues this order clarifying the January 7, 1998 Order Denying as Moot Plaintiffs' Motions to Remand.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, FEB 2 1998.

s/ David Alan Ezra
DAVID ALAN EZRA
UNITED STATES DISTRICT
JUDGE

APPENDIX G — D. Haw. ["Fraudulent Inducement Case"]: ORDER GRANTING PLAINTIFFS' MOTION TO REMAND AND DENYING AS MOOT PLAINTIFFS' MOTION TO DISMISS DEFENDANT DU PONT'S COUNTERCLAIM FILED JANUARY 7, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CV. NO. 97-00740 DAE

EXOTICS HAWAII KONA, INC.; CHIAKI KATO; HARVEY TOMONO; AND ALL RESIDENTS OF THE STATE OF HAWAII SIMILARLY SITUATED,

Plaintiffs,

vs.

E. I. DU PONT De NEMOURS & COMPANY; ALLEN TESHIMA; REGINALD HASEGAWA; AND JOHN DOES 1 - 50,

Defendants.

ORDER GRANTING PLAINTIFFS' MOTION TO REMAND; DENYING AS MOOT PLAINTIFFS' MOTION TO DISMISS DEFENDANT DU PONT'S COUNTERCLAIM

The court heard Plaintiffs' Motions on October 23, 1997. Melvin Y. Agena, Esq., and Riccio M. Tanaka, Esq., appeared at the hearing on behalf of Plaintiffs; Bruce L.

Lamon, Esq., and A. Stephens Clay, Esq., appeared at the hearing on behalf of Defendants. After reviewing the motion and the supporting and opposing memoranda, the court GRANTS Plaintiffs' Motion to Remand and DENIES AS MOOT Plaintiffs' Motion to Dismiss Defendant Du Pont's Counterclaim.

BACKGROUND

This case arises out of three separate settlement agreements which each of the Plaintiffs signed with Du Pont in 1994.[1] In these settlement agreements, Plaintiffs agreed to dismiss their claims against Du Pont. Plaintiffs' claims were based on damage which Plaintiffs allegedly suffered as a result of the use of Benlate, a fungicide manufactured by Du Pont.

On May 9, 1997, Plaintiffs filed the instant lawsuit in the Circuit Court of the Third Circuit, State of Hawaii. In their complaint, Plaintiffs allege that Defendants wrongfully withheld material information in the discovery process and fraudulently induced Plaintiffs to enter into the settlement agreements.

On June 9, 1997, Defendants E.I. Du Pont de Nemours & Company ("Du Pont") and Allen Teshima filed a notice of removal in the United States District Court for the District of Hawaii. The removing defendants asserted diversity jurisdiction as the basis for subject matter jurisdiction.

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1. *See* Settlement Agreements, Attached as Exhibits "I", "W", and "X" to Defendants' Memorandum in Opposition to Plaintiffs' Motion to Remand.

Appendix G

Plaintiffs Exotics Hawaii Kona, Inc., Chiaki Kato, and Harvey Tomono (collectively referred to as "Plaintiffs") are residents and citizens of the State of Hawaii. Defendants Allen Teshima ("Teshima") and Reginald Hasegawa ("Hasegawa") are likewise citizens of the State of Hawaii. The removing parties allege that Defendants Teshima and Hasegawa were fraudulently joined in order to defeat diversity jurisdiction. They therefore allege that Teshima and Hasegawa should be dismissed, or that the court should disregard their citizenship in determining whether diversity jurisdiction exists. Defendants' Notice of Removal, p. 3.

On July 9, 1997, Plaintiffs filed the instant motion to remand this case to state court. Plaintiffs contend that Defendants cannot demonstrate that Teshima and Hasegawa were fraudulently joined. Plaintiffs further contend that a prior stipulation of dismissal between Plaintiffs and Du Pont mandates that this case be heard in the Circuit Court of the Third Circuit, State of Hawaii.

On August 28, 1997, Plaintiffs filed a motion to dismiss Du Pont's counterclaim, asserting that this court lacks subject matter jurisdiction over the counterclaim and that this counterclaim must also be heard in the Circuit Court of the Third Circuit, State of Hawaii.

STANDARD OF REVIEW

Where a case is removed to federal court there is a strong presumption against federal court jurisdiction. *Gaus v. Miles*, 980 F.2d 564, 566 (9th Cir. 1992) (citing *Nishimoto v. Federman-Bachrach & Assocs.*, 903 F.2d 709, 712 n.3

(9th Cir. 1990)). The defendant, who is the removing party, always bears the burden of proving the propriety of removal, including jurisdiction. *Id.*; *Nishimoto*, 903 F.2d at 712 n.3; *Trenton v. Infinity Broadcasting Corp.*, 865 F. Supp. 1416, 1421 (C.D. Cal. 1994); 77 C.J.S. Removal of Causes § 189. The Ninth Circuit strictly construes the removal statute against removal jurisdiction. *Gaus*, 980 F.2d at 566; *Dunn v. Pepsi-Cola Metropolitan Bottling Co., Inc.*, 850 F. Supp. 853, 855 (N.D. Cal. 1994). Federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance. *Id.* In determining whether they should remand a removed civil action due to lack of subject matter jurisdiction, courts should resolve any doubt in favor of remand. 28 U.S.C.A. §§ 1441(a), 1447(c). *See St. Francis Hosp. and Medical Center v. Blue Cross & Blue Shield of Connecticut, Inc.*, 776 F. Supp. 659, 661 (D. Conn. 1991).

The defendant bears the burden of proving fraudulent joinder and establishing that the federal district court has subject matter jurisdiction. *See Pullman Company v. Jenkins*, 305 U.S. 534, 540 (1939); *Cabalceta v. Standard Fruit Co.*, 883 F.2d 1553, 1561 (11th Cir. 1989). Under the Ninth Circuit standard for fraudulent joinder, the defendant has the burden of proving that the plaintiff has failed to state a cause of action against the resident defendant, and that the failure is obvious according to settled law of the state. *McCabe v. General Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987). The standard does not require the defendant to prove fraudulent intent. *Lewis v. Time, Inc.*, 83 F.R.D. 455, 460 (E.D. Cal. 1979), *aff'd*, 710 F.2d 549 (9th Cir. 1983). If the court determines that the plaintiff has failed to allege a valid cause of action against the resident defendant, removal of

the action must be sustained regardless of whether a plaintiff named the resident defendant with the subjective intent to defeat federal jurisdiction.

DISCUSSION

Plaintiffs argue that the court lacks subject matter jurisdiction over this case because complete diversity is lacking on the face of Plaintiffs' complaint. The parties agree that Plaintiffs are residents and citizens of the State of Hawaii. The parties also agree that Defendants Teshima and Hasegawa are residents and citizens of the State of Hawaii. There is therefore, on the face of the complaint, a lack of complete diversity between the parties.

Defendants maintain, however, that the citizenship of Teshima and Hasegawa should be disregarded because these Defendants were fraudulently joined in order to defeat diversity jurisdiction. Defendants make two separate arguments in support of their position. First, Defendants argue that Plaintiffs have failed to state a cause of action against Teshima and Hasegawa under state law. Second, Defendants argue that, under the terms of the settlement agreements signed between the Plaintiffs and Du Pont, Plaintiffs are barred from asserting any claims against the Defendants.

A. *Whether Plaintiffs Can State a Cause of Action Against Defendants Under Hawaii Law*

In determining whether a defendant has been fraudulently joined, the court must begin with an examination

of the plaintiff's complaint. If, upon examination of the complaint, the court finds that "the plaintiff fails to state a cause of action against a resident defendant, and the failure is *obvious* according to settled rules of the state, the joinder of the resident defendant is fraudulent" and the court may disregard the defendant's citizenship in determining whether diversity jurisdiction exists. *McCabe*, 811 F.2d at 1339 (emphasis added).

In their complaint, Plaintiffs allege that Defendants Teshima and Hasegawa conspired with Du Pont to fraudulently withhold material information regarding the harmful effects of the Benlate product. Plaintiffs assert that the object of this conspiracy was to encourage Plaintiffs to settle their claims for "pennies on the dollar." Plaintiffs' Complaint, p.2. In their Memorandum in Opposition to Plaintiffs' Motion to Remand, Defendants argue that the allegations contained in Plaintiffs' Complaint are insufficient to establish a cause of action for conspiracy against Defendants Teshima and Hasegawa. Defendants make several arguments in support of their position.

First, Defendants argue that Plaintiffs' allegations are insufficient to create a cause of action for conspiracy because they do not establish that either Teshima or Hasegawa committed an independent tort, aside from the alleged tort of conspiracy. Defendants correctly assert that under Hawaii law, "there can be no civil claim based upon a conspiracy alone. Therefore, if a plaintiff does not set forth any actionable claim based upon deceit, there can be no claim against any alleged joint tortfeasor based solely upon conspiracy to deceive." *Weinberg v. Mauch*, 890 P.2d 277,

286 (Haw. 1995) (citation and internal quotation marks omitted). However, Defendants incorrectly maintain that Plaintiffs have not alleged any actionable claim against Defendants, aside from a claim of conspiracy.

Plaintiffs' Complaint is replete with allegations that Du Pont fraudulently withheld discovery information during the course of the underlying state court actions. Specifically, Plaintiffs assert that Du Pont "wrongfully and intentionally (a) withheld evidence of insufficient pre-market testing [of Benlate], (b) withheld evidence of insufficient testing for contamination, (c) withheld the results of scientific tests undertaken by Du Pont in Cost[a] Rica and other locations, (d) withheld information uncovered by Du Pont's agents in the course of field investigations, and finally (e) obscured the nature of data from properly performed contamination tests." Plaintiffs' Memorandum in Support of Motion to Remand, p. 14.

Plaintiffs assert that Teshima and Hasegawa participated in committing this fraud upon Plaintiffs by conspiring with Du Pont to withhold material information regarding the harmful effects of Benlate. As evidence of Teshima's and Hasegawa's alleged participation in this conspiracy, Plaintiffs provide the following facts:

> Plaintiffs assert that, between August 16, 1990, and August 19, 1992, Teshima was an employee of Du Pont who oversaw the sale of over 50,000 pounds of Benlate. *Com.*, Para. 184. During that time period, Teshima learned that soil samples taken from the property of a Benlate-claimant

were contaminated with Atrzine, although Teshima told the claimant that such findings were in error. Para. 187. When Teshima learned that small amounts of product contamination posed a risk to sensitive plants, he took no steps to identify what plants were at risk, or to inform Plaintiffs of the potential harm. Para. 189. Teshima visited Plaintiff Kato's properties, took soil samples and promised to provide him results from testing. Teshima never provided any test results to Kato. Para. 191. In 1991 and 1992, Teshima told individual growers that he believed their crops exhibited the effects of Benlate damage. Para. 192, 193. Teshima, later took the position that he never saw any Benlate damaged crops. Para. 196; see also *Response*, Declaration of Teshima, Para. 5 (undated). Plaintiffs allege Teshima's inconsistent position regarding the ability of Benlate to cause crop damage is the result of conduct, in concert with Du Pont and others to misrepresent and conceal facts about the true damaging nature of Benlate for the purpose of avoiding or limiting liability arising from the sale and distribution of Benlate. Para. 196. Plaintiffs allege this conduct is the result of an agreement between Teshima and Du Pont and others entered with the intent of perpetrating a continuing fraud and wrong on Plaintiffs. Para. 197.

During the same time period, Plaintiffs assert that Hasegawa received notice of the "stop sale" order regarding Benlate DF. Hasegawa

specifically failed to inform Plaintiff Kato of the stop-sale, or to advise him to discontinue use of the product. Para. 202. Hasegawa did inform Plaintiff Tomono that contamination problems with the DF product existed, and recommended Tomono cease use of the product. Para. 209. When Kato returned to purchase additional DF product, Hasegawa referred him to the WF product because the DF was no longer available. Para. 203. Hasegawa informed Kato, falsely or without regard to the truth or falsity, that no adulterated or contaminated product had been shipped to Hawaii, and that Kato need not worry about the plant damage. Para. 204. Hasegawa never informed Kato that both the WP and DF products were potentially phytotoxic, or that harmful contaminants were found in Benlate products shipped to Hawaii. Para. 206. Plaintiffs allege Hasegawa's inconsistent position regarding the contamination of Benlate, and the ability of product shipped to Hawaii to cause crop damage, is the result of conduct in concert with Du Pont and others to misrepresent and conceal facts about the true damaging nature of Benlate for the purpose of depriving claimants of full or adequate compensating [sic] for their losses. Para. 211. Plaintiffs allege this conduct is specifically the result of an agreement between Hasegawa, Du Pont and others entered with the intent of perpetrating a continuing fraud and wrong on Plaintiffs. Para. 212.

Appendix G

Plaintiffs' Reply Memorandum, pp. 1-3 (paraphrasing portions of Plaintiffs' Complaint).

Based on these allegations, the court finds that Plaintiffs may be able to assert a cause of action against Teshima and Hasegawa under Hawaii law. Plaintiffs maintain that Teshima and Hasegawa were involved in a conspiracy with Du Pont to deprive Plaintiffs of the information they needed in order to accurately evaluate the strength of their claims against Du Pont. In their allegations against these Defendants, Plaintiffs contend that Teshima and Hasegawa had an agreement with Du Pont to "misrepresent and conceal facts about the true damaging nature of Benlate." Plaintiffs' Reply Memorandum, p. 3. Although Plaintiffs have not presented the full details of this alleged conspiracy, Plaintiffs have presented some facts which indicate that these Defendants may have acted fraudulently and in doing so conspired with Du Pont to defraud the Plaintiffs. At this stage of the litigation, these facts are sufficient to establish a possible cause of action against Defendants for conspiracy. *See, e.g., Rodriguez v. Sabatino*, 120 F.3d 589, 591 (5th Cir. 1997) ("In evaluating a claim of fraudulent joinder, we do not determine whether the plaintiff will actually or even probably prevail on the merits of the claim, but look only for a possibility that the plaintiff may do so.").[2]

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2. Defendants argue that Plaintiffs cannot establish a cause of action for conspiracy based on these allegations because the actions allegedly taken by Defendants Teshima and Hasegawa occurred prior to the filing of Plaintiffs' lawsuits in state court. Defendants contend that "the fact that plaintiffs filed their underlying cases conclusively demonstrates that they were not relying on any alleged

(Cont'd)

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Defendants alternatively assert that Plaintiffs cannot establish a cause of action against Teshima and Hasegawa because, as a matter of law, a corporation cannot conspire with its agents. *See, e.g., Marmott v. Maryland Lumber Co.*, 807 F.2d 1180, 184 (4th Cir. 1986). In this case, the facts clearly establish that Teshima was employed as a sales representative for Du Pont in the State of Hawaii. *See* Plaintiffs' Complaint, ¶ 7. Consequently, Teshima would be considered an agent of Du Pont. However, Hasegawa was not an employee of Du Pont. Hasegawa was, and still is, employed by Loveland Industries, Inc., d/b/a United Agri Products ("UAP"). UAP is a corporate affiliate of Platte Chemical Company, and is not a subsidiary of Du Pont. Based on these facts, the court cannot conclude that Hasegawa was acting as an agent for Du Pont in distributing the Benlate product.

(Cont'd)
representations that Benlate was not the cause of their alleged property damage." Defendants' Memorandum in Opposition to Plaintiffs' Motion to Remand, p. 20. This argument, however, misconstrues the allegations contained in Plaintiffs' Complaint. In filing their underlying state court actions, Plaintiffs were obviously aware that Benlate was the probable cause of their alleged property damage. However, in their current lawsuit, Plaintiffs assert that Du Pont conspired with Teshima and Hasegawa to conceal material evidence regarding the exact nature of the harmful effects of Benlate. Therefore, any alleged misrepresentations by Defendants Teshima or Hasegawa regarding the harmful effects of Benlate, aside from constituting a cause of action for fraud, could be used by Plaintiffs to establish that Teshima and Hasegawa were acting in concert with "Du Pont and others, to misrepresent, conceal material facts from and deceive potential Benlate claimants about, the true damaging nature of Benlate." Plaintiffs' Complaint, ¶ 196.

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However, even if the court were to conclude that Hasegawa was an agent of Du Pont, this would not necessarily preclude Plaintiffs' claims in this case. Although the general rule is that a corporation may not conspire with its agents, this rule has an important exception. Where the corporate agent has an interest in the conspiracy which is separate and distinct from the corporation's interest, the court may find that a conspiracy exists between the corporation and its agent. *See, e.g., Cedar Hills Properties Corp. v. Eastern Federal Corp.*, 575 So.2d 673, 676 (Fl. Dist. Ct. App. 1991). Hasegawa was individually named as a defendant in the *Kawamato/Tomono* case. Consequently, Hasegawa had a personal interest in the Benlate litigation, and the information which Plaintiffs were able to obtain regarding the harmful effects of Benlate. The court therefore concludes that Plaintiffs may be able to assert a claim against Defendants for conspiracy, even if Hasegawa is ultimately found to be an agent of Du Pont.

Based on the allegations contained in Plaintiffs' Complaint, the court concludes that Plaintiffs has produced sufficient facts to support a *possible* cause of action for conspiracy against Defendants Teshima and Hasegawa under Hawaii law. At this point in the litigation, it is not *obvious* to the court that Defendants Teshima and Hasegawa were fraudulently joined in this lawsuit. Consequently, there is no diversity of citizenship between the parties and no basis for federal court jurisdiction.

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B. *Settlement Agreement*

Defendants alternatively assert that Plaintiffs cannot state a cause of action against Defendants because their claims are barred by the settlement agreements which each of the Plaintiffs signed with Du Pont.[3] In 1994, Plaintiffs Exotics, Kato and Tomono individually executed settlement agreements with Du Pont. In the agreements signed by Kato and Tomono, these Plaintiffs agreed to release Du Pont "from any and all causes of action, claims, demands, actions, obligations, damages or liability, which Plaintiff asserted or which could have been asserted against Defendant [Du Pont] in the Action." *See* Kato's Settlement Agreement, Attached as Exhibit "W" to Defendants' Memorandum in Opposition and Tomono's Settlement Agreement Attached as Exhibit "X" to Defendants' Memorandum in Opposition. Importantly, this release provision does not state that Kato and Tomono were releasing all claims, "whether known or unknown", against Du Pont.[4] The release is also limited to those claims which Kato and Tomono could have asserted against Du Pont "in the Action." In this case, Kato and

---

3. *See* Settlement Agreements, Attached as Exhibits "I", "W", and "X" to Defendants' Memorandum in Opposition to Plaintiffs' Motion to Remand.

4. In the settlement agreement signed by Exotics, the release provision specified that Exotics agreed to release Du Pont "from any and all causes of action, claims, demands, actions, obligations, damages, or liability, whether known or unknown, that Plaintiff ever had, now has or may hereafter have against Defendant." *See* Exotics Settlement Agreement, Attached as Exhibit "I" to Defendants' Memorandum in Opposition.

Tomono are not asserting the same claims they asserted against Du Pont in the underlying state court action. In this lawsuit, Plaintiffs are attempting to impose liability on Du Pont for fraudulently withholding material information regarding the harmful effects of Benlate in order to induce Plaintiffs to settle the case at a fraction of its worth.

Looking at the language of the release provision, the court cannot conclude that Kato's and Tomono's claims are barred by the settlement agreements as a matter of law. Under Hawaii law, "[a] compromise and settlement should be construed to include only those matters the parties intended to include; it should not be construed to extend to other matters." *Wiginton v. Pacific Credit Corp.*, 634 P.2d 111, 117 (Haw. Ct. App. 1981).[5] Viewing the language of the settlement agreements in the light most favorable to Plaintiffs, the court finds that the parties may not have intended that their release provisions would bar Plaintiffs' claims in this lawsuit. Accordingly, the court finds that the settlement agreements do not support Defendants' argument that Teshima and Hasegawa were fraudulently joined in this lawsuit.[6]

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5. Although Exotics' settlement agreement did contain a choice of law provision which specified that Delaware law would apply to the interpretation of the agreement, the settlement agreements singed by Kato and Tomono did not contain a choice of law provision. Therefore, Hawaii law would apply to this issue of contract interpretation.

6. Although the court has concluded that the settlement agreements signed by Kato and Tomono do not, as a matter of law,

(Cont'd)

Based on the foregoing analysis, the court concludes that Defendants have failed to meet their burden of establishing fraudulent joinder. Accordingly, this court does not have subject matter jurisdiction over this case and must remand this case to state court.[7] Plaintiffs' Motion to Remand is therefore GRANTED. As the court has granted Plaintiffs' Motion to Remand, the court DENIES AS MOOT Plaintiffs' Motion to Dismiss Du Pont's Counterclaim.

CONCLUSION

For the reasons stated above, the court GRANTS Plaintiffs' Motion to Remand and DENIES AS MOOT Plaintiffs' Motion to Dismiss Du Pont's Counterclaim.

(Cont'd)
bar their claims against the Defendants in this lawsuit, the court expresses no opinion as to whether the settlement agreement signed by Exotics bars Exotics' claims against the Defendants based on this court's decision in *Matsuura v. Du Pont*, Civil No. 96-01180 DAE. The court also does not suggest that at the summary judgment stage in State court where the record and the scope of the court's review is much broader, that a different result may be warranted.

7. As the court has concluded that it does not have subject matter jurisdiction over this case, the court cannot address Plaintiffs' remaining argument that the parties are required to litigate this action in state court pursuant to a stipulation of dismissal signed between Plaintiffs and Du Pont. *See* Stipulation for Dismissal With Prejudice, Attached as Exhibits 4-6 to Plaintiffs' Reply Memorandum in Support of Plaintiffs' Motion to Remand. In order to address this issue of contract interpretation, the court must first have subject matter jurisdiction over Plaintiffs' Complaint. *See, e.g., Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 278 (9th Cir. 1984).

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, JAN 07 1998.

s/ David Alan Ezra
DAVID ALAN EZRA
UNITED STATES DISTRICT
JUDGE

APPENDIX H — CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULE INVOLVED

U.S. Const., Art. III, §§ 1 and 2

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

* * *

U.S. Const., Art. VI

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the

United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * *

28 U.S.C. § 1331

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

* * *

28 U.S.C. § 1441(a) and (b)

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

* * *

28 U.S.C. § 1446(d)

§ 1446. Procedure for removal

* * *

(d) Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

* * *

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28 U.S.C. § 1447(c)

§ 1447. Procedure after removal generally

* * *

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

* * *

Fed. R. Civ. P. 11(b) and (c)

Rule 11. Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions

* * *

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, —

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

* * * *

APPENDIX I — 3d Cir. Ct. of State of Haw. ["Wrongful Removal Cases"]: PETITIONERS' MOTION FOR ORDER TO SHOW CAUSE WHY RESPONDENTS E.I. DU PONT DE NEMOURS & COMPANY AND ITS COUNSEL SHOULD NOT BE HELD IN CONTEMPT OF COURT AND FOR ENFORCEMENT OF STIPULATION FOR DISMISSAL WITH PREJUDICE OF ALL CLAIMS AND PARTIES DATED OCTOBER 28, 1994 DATED AUGUST 28, 1997

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Appendix 1

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IN THE CIRCUIT COURT OF THE THIRD CIRCUIT
STATE OF HAWAII

S.P. No.

CHIAKI KATO and HARVEY TOMONO;

Petitioners,

– vs –

E. I. DU PONT De NEMOURS & COMPANY; AND
GOODSILL ANDERSON QUINN & STIFEL,

Respondents.

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PETITIONERS' MOTION FOR ORDER TO SHOW CAUSE WHY RESPONDENTS E.I. DU PONT DE NEMOURS & COMPANY AND ITS COUNSEL SHOULD NOT BE HELD IN CONTEMPT OF COURT AND FOR ENFORCEMENT OF STIPULATION FOR DISMISSAL WITH PREJUDICE OF ALL CLAIMS AND PARTIES DATED OCTOBER 28, 1994; MEMORANDUM IN SUPPORT OF MOTION; AFFIDAVIT OF MELVIN Y. AGENA; EXHIBITS "1" to "11"; NOTICE OF HEARING; CERTIFICATE OF SERVICE

DATE: September 9, 1997
TIME: 8:30 a.m.
JUDGE: Ronald Ibarra

REPRESENTATIVE PETITIONERS' MOTION FOR ORDER TO SHOW CAUSE WHY RESPONDENTS E.I. DU PONT DE NEMOURS & COMPANY AND ITS COUNSEL SHOULD NOT BE HELD IN CONTEMPT OF COURT AND FOR ENFORCEMENT OF STIPULATION FOR DISMISSAL WITH PREJUDICE OF ALL CLAIMS AND PARTIES DATED OCTOBER 28, 1994

COME NOW, Petitioners CHIAKI KATO ("Kato") and HARVEY TOMONO ("Tomono"), by and through their counsel, and hereby move this Court to issue an Order To Show Cause Why Respondents E.I. Du Pont De Nemours & Company ("Du Pont") and its counsel, The Law Firm of Goodsill Anderson Quinn & Stifel, ("The Law Firm"), should not be held in contempt of court for violation of the Stipulations for Dismissal With Prejudice of All Claims and

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Parties dated October 28, 1994, ("Settlement Stipulation and Order") entered in the cases of *Kato et al. v. E.I. Du Pont De Nemours & Company, et al.*, Civil No. 92-309 K ("Kato Lawsuit") and *Glover Orchids, Inc., et al. v. E.I. Du Pont De Nemours & Company*, Civil No. 93-063K. ("Tomono Lawsuit"). Both the Kato Lawsuit and the Tomono Lawsuit were filed in the Circuit Court of the Third Circuit, Kona Division ("Kona Circuit Court"). Petitioners Kato and Tomono ("Petitioners") assert that Du Pont, and The Law Firm ("Contemnors") have willfully violated the Settlement Stipulations by: (a) filing the Notice of Removal on June 9, 1997 ("Removal Motion") thereby seeking to transfer the Complaint filed herein as Civil No. 97-103K to the Federal District Court, Hawaii Division (Civil No. 97-00740 DAE). Said removal expressly violates the Settlement Stipulation and Order which provides that Du Pont and Petitioners shall litigate any and all claims related to the Tortiously Instigated Settlement in the Kona Circuit Court. Contemnors have further violated the Settlement Stipulation and Order by filing a Counterclaim against Petitioners in the Federal Court.

Concurrently, Petitioners seek an order enforcing the Settlement Stipulation and Order, precluding Contemnors from maintaining their actions for removal and for Counterclaim relief in the Federal Court.

This Motion is based upon Section 603-21.9, (1) and (6), Hawaii Revised Statute ("HRS"), *Magoon v. Magoon*, 70 Haw. 605, 610 (1989), *1000 Friends of Oregon v. Land Conservation and Development Commission*, 724 P.2d 805, 807 (Ore. 1986), *Hazel Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944) and *Kukui Nuts of Hawaii v.*

R. Baird & Co., Inc., 7 Haw.App. 598, 624 (1990), the records and files of this case, the memorandum of law attached hereto, and such other matters as may be presented at a hearing on this Motion.

DATED: Honolulu, Hawaii, August 28, 1997.

s/ Melvin Y. Agena
MELVIN Y. AGENA
Attorneys for Petitioners

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Appendix 1

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT
STATE OF HAWAII

SP. NO.

CHIAKI KATO and HARVEY TOMONO;

Petitioners,

vs.

E.I. DU PONT De NEMOURS & COMPANY and
GOODSILL ANDERSON QUINN & STIFEL,

Respondents.

MEMORANDUM IN SUPPORT OF PETITIONERS' MOTION TO SHOW CAUSE WHY RESPONDENTS E.I. DU PONT DE NEMOURS & COMPANY AND ITS COUNSEL SHOULD NOT BE HELD IN CONTEMPT OF COURT AND FOR ENFORCEMENT OR STIPULATION FOR DISMISSAL WITH PREJUDICE OF ALL PARTIES DATED OCTOBER 28, 1994

COME NOW PETITIONERS CHIAKI KATO ("Kato") AND HARVEY TOMONO ("Tomono"), by and through their counsels, and hereby file this Memorandum in Support of the Motion for Order To Show Cause Why Respondents E.I. Du Pont De Nemours & Company ("Du Pont"), its counsel, the Law Firm of Goodsill Anderson Quinn & Stifel ("The Law Firm"), Should Not Be Held In Contempt of Court ("OSC Motion"). Kato and Tomono ("Petitioners") bring the

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OSC Motion to seek enforcement of the Stipulations for Dismissal With Prejudice of all Claims and Parties, entered in their respective cases, by this Honorable Court on October 28, 1994 ("Settlement Stipulation and Order"). Said Settlement Stipulation and Order provided in part that Du Pont and Petitioners would litigate all claims and disputes "arising out of" the Tortiously Instigated Settlement before this Honorable Court. Du Pont and The Law Firm ("Contemnors") have willfully violated the Settlement Stipulation and Order by removing the action filed by Petitioners in this Court as Civil No. 97-103K on May 9, 1997 ("Complaint") to the United States District Court for the State of Hawaii ("Federal Court"). Further, Contemnors have filed a Counterclaim against Petitioners and others on July 31, 1997 ("Counterclaim"). The filing of the Counterclaim in Federal Court further violated the Stipulated Settlement and Order.

Concurrently, Petitioners seek an order enforcing the Stipulated Settlement and Order, enjoining Contemnors from maintaining an action to Remove the claims asserted in the Complaint to the Federal Court and compelling Contemnors to withdraw the Counterclaim.

I. *STATEMENT OF FACTS.*

A. PRIOR LITIGATION INVOLVING PETITIONERS.

1. On or about December 1, 1992, Kato and others filed an action in the Third Circuit Court, entitled *Kato et al. v. E.I. Du Pont De Nemours & Company, et al.*, Civil No. 92-309K. ("Kato Lawsuit") (Exhibit "1" attached hereto).

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2. On or about January 27, 1993, Exotics Hawaii Kona, Ltd. ("Exotics") and Exotics Hawaii, Ltd., filed an action in the Third Circuit Court, entitled, *Exotics Hawaii Kona, Inc. et al. v. E.I. Du Pont De Nemours, & Company*, Civil No. 93-025K. ("Exotics Lawsuit") (Exhibit "2", attached hereto.)

3. On or about March 5, 1993, Tomono and others filed an action in the Third Circuit Court, entitled *Glover Orchids, Inc. et al. v. E. I. Du Pont De Nemours & Company*, Civil No. 93-063K. ("Tomono Lawsuit") (Exhibit "3" attached hereto).

4. On or about September 14, 1993, the Kato, Exotics and Tomono Lawsuits were consolidated for discovery purposes with other Benlate litigation filed in the Third Circuit Court. A General Pretrial Order Consolidating, For Discovery Only, Cases in the Circuit Court of the Third Circuit was issued on September 14, 1993 ("Consolidation Order") by the Honorable Ronald Ibarra. (Exhibit "4", attached hereto).

5. During the course of litigation in Third Circuit Court, Du Pont and others engaged in an active, conscious and deliberate effort to misinform, defraud and mislead Petitioners and the Third Circuit Court. Du Pont, Defendants Reginald Hasegawa ("Hasegawa"), Allen Teshima ("Teshima") and others, defrauded Petitioners and others into settling their claims with Du Pont.

6. As a direct result of the wrongful conduct committed by Du Pont and others on Petitioners, various settlements were achieved. ("Tortiously Instigated Settlements"). As part

of the Tortiously Instigated Settlements process, Petitioners executed various stipulations allowing for the dismissal of the cases.

B. SETTLEMENT STIPULATION & ORDER

1. On or about November 21, 1994, Exotics executed with Du Pont a "Stipulation for Dismissal with Prejudice of All claims and Parties", which dismissed the claims of the litigants and stipulated that all further claims, including claims related to the settlement, were to be litigated in the Third Circuit. ("Settlement Stipulation & Order") (Exhibit "5" attached, hereto).

2. More specifically, the Stipulation of Dismissal and Retention of Jurisdiction for Exotics provided as follows:

> IT IS HEREBY STIPULATED, by and between Plaintiffs and Defendants E.I. Du PONT de NEMOURS & COMPANY, . . .
>
> It is further expressly stipulated and agreed, by and between the parties that, notwithstanding the dismissal with prejudice of this action, *this Court* [Third Circuit Court] *shall retain jurisdiction to resolve any disputes amongst the parties* relating to this action, *including but not limited to, disputes arising out of its settlement*. (See Exhibit "6" attached hereto and made a part hereof.)

3. The Stipulated Settlement and Order for Exotics was signed by Ms. Linda Lee Farm, over the signature of John R. Lacy, as attorneys for Du Pont and others.

4. On or about October 28, 1994, Kato and Tomono, through their counsels, executed virtually identical "Stipulations for Dismissal with Prejudice of all Claims and Parties" for their respective actions (Exhibits "6" and "7" attached hereto). The above stated Stipulations both contained the following pertinent language:

> It is further expressly stipulated and agreed, by and between the parties that, notwithstanding the dismissal with prejudice of this action, *this Court* [Third Circuit Court] *shall retain jurisdiction to resolve any disputes amongst the parties* relating to this action, *including, but not limited to, disputes arising out of its settlement*. (See Exhibits "2" and "3" attached hereto and made a part hereof).

This language is identical to the language contained in the Exotics' Stipulation.

5. The Kato Settlement Stipulation & Order appears to be signed by Jacqueline Earle, over the signature of John R. Lacy, as attorney for Du Pont and others. Further, the Kato Settlement Stipulation & Order was "[A]pproved and [S]o [O]rdered" by Judge Ronald Ibarra (Exhibit "6" attached hereto).

6. The Tomono Settlement Stipulation & Order also appears to be signed by Jacqueline Earle over the signature of John R. Lacy, as attorney for Du Pont and others. Further, the Tomono Settlement Stipulation & Order was also "Approved and So Ordered" by Judge Ronald Ibarra (Exhibit "7" attached hereto).

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C. PROCEDURAL HISTORY

1. On May 9, 1997, Petitioners filed their Complaint against Du Pont, Teshima and Hasegawa. The Complaint was filed in the Third Circuit Court, as Civil No. 97-103K.

2. The Complaint alleges *inter alia* that Du Pont, Teshima and Hasegawa, made a mockery of the judicial proceeding in the Third Circuit Court by misforming, defrauding and misleading Petitioners and others during the course of the underlying lawsuits. Du Pont and others lied to Petitioners, this Court and others about material aspects of Benlate. As a proximate result of the fraud, misrepresentation destruction of evidence, etc. ("Unconscionably Tortious Conduct"), Petitioners were induced to execute Tortiously Instigated Settlements (See ¶ 150 et. seq. of the Complaint).

3. Most, if not all, of the relevant Unconscionably Tortious Conduct took place in the Third Circuit Court during the litigation of the Petitioners' lawsuits (Complaint ¶ 12). In fact, much of the Unconscionably Tortious Conduct took place during Court proceedings in the Third Circuit Court (Complaint ¶ 13-15).

4. Du Pont and others, in committing the Unconscionably Tortious Conduct, challenged, ridiculed and expressed willful disdain for the judicial forum of the State of Hawaii. Petitioners' due process rights and their guaranteed rights to a fair trial and substantial justice were trampled upon by the Unconscionably Tortious Conduct of Du Pont and others.

5. Petitioners, in accordance with the Settlement Stipulation & Order, filed their current Complaint with the Third Circuit Court on May 9, 1997.

6. Du Pont and The Law Firm, in violation of the Settlement Stipulation & Order, sought to remove the action from the Third Circuit Court to the Federal Court. On June 9, 1997, Du Pont filed a Notice of Removal ("Notice of Removal") (See Exhibit "8" attached hereto). This was a willful intentional & conscious act in total disregard of the Settlement Stipulation & Order. More importantly, Du Pont and other Contemnors blatantly violated the express order of this Court.

7. On July 9, 1997, Petitioners filed their Motion for Remand ("Remand Motion" See Exhibit "9" attached hereto). The hearing on the Remand Motion was originally set for September 2, 1997. It has been continued by the Federal Court to September 12, 1997.

D. THE COUNTERCLAIM.

1. Du Pont filed its Answer and Counterclaim on July 31, 1997 ("Counterclaim, See Exhibit "10" attached hereto). Teshima filed his Answer on July 31, 1997. Hasegawa filed his Answer on August 11, 1997.

2. The claims of Du Pont against Petitioners are based squarely upon the alleged "breaches of their [Petitioners'] respective settlement and release agreement with DuPont." (Counterclaim, Paragraph 2).

3. There are two causes of action which have been asserted as part of the Counterclaim. The first is a claim for Breach of Release and Contractual Indemnity. Du Pont has claimed that the Petitioners have breached their releases given as part of their Tortiously Instigated Settlement with Du Pont. As a proximate result therefrom, Du Pont is alleging that it should be awarded damages under the terms of the respective Tortiously Instigated Settlement Agreements. (Counterclaim ¶ 72-75).

4. The second claim is for Preliminary and Permanent Injunctive Relief. Du Pont claims the right to a preliminary and permanent injunction, precluding Petitioners from prosecuting the present action and forbidding the commencement of any subsequent action, based upon the Tortiously Instigated Settlement. (Counterclaim at ¶ 76 to 79).

5. Both Du Pont's claims for damages, and for injunctive relief, are based upon the Tortiously Instigated Settlements. Du Pont violated the Settlement Stipulation & Order by filing the Counterclaim in Federal Court against Petitioners.

6. Incredibly, attached as Exhibits J, K & L to the Counterclaim were copies of the Settlement Stipulations & Orders for the Exotics, Kato and Tomono Lawsuits. Even though Du Pont and The Law Firm knew that the express provisions in the Settlement Stipulations and Orders required Du Pont to litigate matters in the Third Circuit Court, Du Pont and The Law Firm filed the Counterclaim, in the Federal Court.

7. Contemnors, by filing the Counterclaim with Exhibits of the Settlement Stipulation and Order, attached thereto, have once again arrogantly and disdainfully violated a direct, clear, explicit and unequivocal Order of this Third Circuit Court.

8. Petitioners filed a Motion To Dismiss the Counterclaim (See Exhibit 11, attached hereto) on August 28, 1997 asserting that the Federal Court lacks jurisdiction to hear such claims.

II. *ARGUMENTS.*

A. THE STIPULATION FOR DISMISSAL AND RETENTION OF JURISDICTION IS CLEAR: DU PONT AFFIRMATIVELY COVENANTED TO LITIGATE ALL DISPUTES CONCERNING THE SETTLEMENT IN THE THIRD CIRCUIT COURT.

Du Pont, in writing and with the approval and sanction of the Third Circuit Court, promised to litigate all future disputes relating to the Tortiously Instigated Settlement in the Third Circuit Court. Du Pont, through its counsel, also stipulated to this Provision, and the Stipulated Settlement & Order was filed in the Third Circuit Court.

The specific language of the Settlement Stipulation & Order provided:

> It is further expressly stipulated and agreed, by and between the parties that, notwithstanding the dismissal with prejudice of this action, *this Court*

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> *[Third Circuit Court] shall retain jurisdiction to resolve any disputes amongst the parties relating to this action*, including, but not limited to, *disputes arising out of its settlement* (Emphasis Added).

All parties, Du Pont and Petitioners, made mutual promises and covenants. All parties agreed that, in the event any dispute arose between them relating to the Tortiously Instigated Settlement, they would litigate their claims in the Third Circuit Court. Mutual reciprocal covenants constitute good and sufficient consideration to support a contractual promise. *Guaschino v. Eucalyptus, Inc.*, 3 Haw.App. 632, 658 P.2d 888 (1983).

Further, where a promise confers a benefit to the person making the promise, or a detriment to the person to whom the promise is made, the promise is sufficient to support the covenant. *Sylvester v. Animal Emergency Clinic*, 9 Haw.App. 85, 832 P.2d 745 (1990). Here, there are mutual benefits and mutual detriments to the parties. All parties waived their rights to litigate matters in another forum. Moreover, all parties agreed to litigate all Tortiously Instigated Settlement disputes before the Third Circuit Court. For all parties, the Third Circuit Court was, and is, the most convenient forum to litigate all claims related to the Tortiously Instigated Settlement since it was there that the parties consummated their settlements and settlement agreements.

The Settlement Stipulation & Order is clear, concise, unambiguous and plain. There was sufficient consideration for the covenants contained in the dismissal. As such, this

Court should enforce the parties' agreement to have all disputes relating to the Tortiously Instigated Settlement litigated and resolved in the Third Circuit Court.

B. DU PONT HAS WAIVED ITS RIGHT TO ASSERT ANY COUNTERCLAIM IN THE FEDERAL COURTS OR TO REMOVE THE ORIGINAL COMPLAINT TO THE FEDERAL COURT.

The power of a party to invoke the federal jurisdiction over a claim is permissive rather than absolute. "A contractual forum selection clause that specifies a state court in which the parties must litigage (or try) a dispute that may arise between them is enforceable and constitutes a waiver of the defendant's right to remove the suit." 16 *Moore's Federal Practice* 3rd, § 107.18[1][b]. Citing *Ferrari, Alvarez, Olsen, & Ottoboni v. Home Ins. Co.* 940 F.2d 550, 554 (9th Cir. 1991) *Pelleport Investors v. 3rd Co. Quality Theatres, Inc.* 741 F.2d 273, 279 (9th Cir. 1984). The right to remove a case is personal. Like all personal rights it may be waived. Once waived, the party has forever lost the option to compel a federal court to assert jurisdiction over the matters. For these reasons, this Court should enforce the forum selection clause in the Settlement Stipulation & Order.

The law of waiver is well established in Hawaii. It has been defined as follows:

> Waiver is the intentional relinquishment of a known right, or such conduct as warrants an

> inference of such surrender and it is not essential to its application that prejudice results to the party in whose favor the waiver operates. *Hewahewa v. Lalakea*, 35 Haw. 213, 219 (1939) (quoting *United States Fidelity & Guaranty Co. v. Miller* 237 Ky. 43, 47, 34, S.W.2d 938) (Cited with authority by *Wilart Associates v. Kapiolani Plaza, Ltd.* 7 Haw.App. 354 (1988).

Conduct establishing waiver has been recognized to be " 'expressed or implied[,]' and 'it may be established by express statement or by agreement, or by acts and conduct from which an intention to waive may reasonably be inferred' " (Id. at 359-360). (See also *Association of Owners of Kukui Plaza v. Swinerton & Walberg Co.*, 68 Haw. 98, 705 P.2d 28 (1985).

Here, Du Pont executed a written stipulation to litigate all matters pertaining to the settlement in the Third Circuit Court. The exact language of the Stipulation for Dismissal and Retention of Jurisdiction states as follows:

> It is further expressly stipulated and agreed, by and between the parties that, notwithstanding the dismissal with prejudice of this action, this Court [the Third Circuit Court shall retain jurisdiction to resolve any disputes amongst the parties relating to this action, including, but not limited to, disputes arising out of its settlement.

Du Pont executed the same form of the Stipulated Settlement and Order not once, *but on at least three (3)*

separate occasions.[1] The parties affirmatively covenanted to adjudicate and litigate all matters relating to the "the action . . . including all disputes arising out of its settlement" in the Third Circuit Court. It is clear that Du Pont has, by agreeing to litigate matters in the Third Circuit Court, waived its right to litigate matters in any other forum, jurisdiction or even venue.

C. DU PONT SHOULD BE EQUITABLY ESTOPPED FROM ASSERTING AFFIRMATIVE CLAIMS IN FEDERAL COURT OR TO REMOVE THE ORIGINAL COMPLAINT TO THE FEDERAL COURT

Du Pont has specifically covenanted to litigate all matters in the Third Circuit Court. Moreover, it has waived all of its rights to remove or even bring a separate action in any other forum relating to the Tortiously Instigated Settlement. Having violated a signed, written and judicially approved agreement, this Court should equitably estop Du Pont from prosecuting its claims in Federal Court.

In *Strouss v. Simmons*, 66 Haw. 32, 657 P.2d 1004 (1982), the Hawaii Supreme Court identified the elements of "equitable estoppel" as follows:

---

1. *Although Counsel for Petitioner has not personally reviewed all of the Stipulations for Dismissal, it is apparent that there numerous more Stipulations for Dismissals, signed by Du Pont, which contain the same language. Since Petitioners have filed a class action, all of class action Plaintiffs' respective claims should be tried in the Third Circuit Court.*

Appendix I

> The material elements of equitable estoppel require one person to wilfully cause another person to erroneously believe a certain state of things and the other person to reasonably rely on his or her erroneous belief to his or her detriment.

(In accord, *Anderson v. Anderson*, 59 Haw. 575, 586 P.2d 938 (1978), and *Aehegma v. Aehegma*, 8 Haw. App. 215, 223, 797 P.2d 74 (1990).

A close cousin of equitable estoppel is the doctrine of "quasi-estoppel". Under the doctrine of quasi estoppel, a party is precluded from asserting, to another's disadvantage, "a right inconsistent with a position previously taken by him." *Hartmann v. Bertelmann*, 39 Haw. 619, 628 (1952)) (See also *Maria v. Freitas*, 73 Haw. 226, 832 P.2d 259 (1992).

Under either doctrine, this Court should compel Du Pont to dismiss the Counterclaim and force Du Pont to live up to its written obligation. Here, Du Pont, at the time of the Tortiously Instigated Settlement, agreed to have all future "disputes" resolved before the Third Circuit Court. The rationale for the settling parties to select the Third Circuit Court is obvious. The Third Circuit Court handled the original litigation including the Tortiously Instigated Settlement and knew the intent of the parties. The parties agreed that the Third Circuit Court would be a fair place to resolve all disputed claims. Based upon this representation, the Petitioners permitted their counsels to execute the Settlement Stipulations & Order.

Moreover, under the "quasi-estoppel" doctrine, Du Pont should not be permitted to take one position before the Third Circuit Court and a different position before the Federal Courts. Having agreed to litigate all matters pertaining to the dispute before the Third Circuit Court, Du Pont should not now be permitted to breach its agreement by litigating in the Federal Courts. The actions of Du Pont, in attempting to litigate Counterclaims in the Federal Court, is made more offensive by the fact that they have intentionally violated the order of the Third Circuit Court.

D. THE THIRD CIRCUIT COURT HAS THE INHERENT POWER TO ENFORCE ORDERS WHICH IT HAS ISSUED.

Aside from being a contractual agreement, the Settlement Stipulation and Order *is an order* which was generated from this Third Circuit Court. A trial court is empowered under Section 603-21.9, HRS to:

> (6) To make and award such judgments, decrees, orders, and mandates, issue such executions and other processes, and *do such other acts and take such other steps as may be necessary to carry into full effect the powers which are or shall be given to them by law or for the promotion of justice in matters pending before them* ("Emphasis Added").

It is a well recognized principle that courts of record have the inherent power to enforce its orders by way of civil contempt. *U.S. v. State of Hawaii*, 855 F.Supp. 212 (D. Haw.

1995) (See also *Coll v. Desha* 27 Haw. 855 (1944) stating that the trial court has the inherent power hold a party in contempt; *Application of Balucan*, 44 Haw. 271, 357 P.2d 631 (1960) that the traditional means for compelling a party to obey a court order is through the use of the contempt power).

E. THIS COURT SHOULD HOLD DU PONT AND THE LAW FIRM IN CIVIL CONTEMPT FOR THEIR WILLFUL, WANTON, DELIBERATE AND EGREGIOUS VIOLATION OF THE ORDER OF THIS COURT.

Petitioners are seeking an order from this Court holding Du Pont and The Law Firm in civil contempt. The distinction between civil contempt and criminal contempt has been defined as follows:

> Civil contempt is remedial whereas criminal contempt is punitive in purpose. The significant and essential characteristic of a sanction imposed for civil contempt is that the penalty can be avoided by compliance with the court order. (cite omitted). Ability to comply must exist as a matter of substance as well as form. (*Murray v. Murray*, 60 Haw. 160, 162, 587 P.2d 1220 (1978)). (See also *Hawaii Public Employment Relations Board v. United Public Workers* 66 Haw. 461, 479, 520 P.2d 422, holding, "[c]ivil as distinguished from criminal contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by

> reasons of noncompliance and may be imposed for prohibited acts irrespective as to intent."

The form of the sanction may be monetary, (Id. at 480) or the court may order the party to be placed in custody (*Murray v. Murray*, *supra* at 163). Section 710-1077, HRS, also notes that:

> (6) Nothing in this section, [Criminal Contempt] shall be construed to alter the court's power to punish civil contempt. When the contempt consists of the refusal to perform an action which the contemnor has the power to perform, he may be imprisoned until he has performed it.

The facts in the present case are clear and show that Du Pont and The Law Firm should be held in contempt of court. Du Pont had agreed to litigate "disputes" relating to the Tortiously Instigated Settlement in the Third Circuit Court. The Stipulated Settlement and Order set forth the intent of the parties, and the mandate of this Court, in clear, concise and unequivocal language. Du Pont and The Law Firm have violated the Stipulated Settlement and Order by two separate and distinct actions. First, Contemnors sought to remove the Complaint filed by them to the Federal Court. The Complaint clearly sets forth "disputes" arising from the Tortiously Instigated Settlement. Second, Contemnors have filed a Counterclaim, allegedly based on breach of the Tortiously Instigated Settlement against Petitioners in Federal Court. Again, this is a clear violation of the Settlement Stipulation and Order.

Appendix 1

Contemnors cannot claim ignorance or neglect. The Law Firm executed the Stipulated Settlement and Order and had personal knowledge of its contents. Further, the Counterclaim had copies of the Settlement Stipulation and Order attached as exhibits to the Counterclaim. (See Exhibits "J, K & L" attached thereto). The action of Contemnors can only be characterized at willful, wanton, deliberate and intentional.

F. THIS COURT SHOULD ORDER DU PONT AND THE LAW FIRM TO WITHDRAW THE NOTICE OF REMOVAL AND COUNTERCLAIM, UPON THE THREAT OF THE SANCTIONS OF MONETARY FINES DAY AND/OR CONFINEMENT BY THIS COURT.

The Benlate litigation was not an ordinary case. Du Pont was not an ordinary litigant. Du Pont's abusive actions in deliberately disobeying the lawful orders of this and other courts are well documented. (See Conclusions of Law and Findings of Fact dated August 19, 1996, by this Court attached as Exhibit "1" to the Complaint. See also the *Bush Ranch* Order and Opinions attached as Exhibits "2" and "3" to the Complaint). There can be no question that Du Pont had embarked upon a malicious, wilful and deliberate scheme to violate every common notion of "fair play" and "substantial justice" which are the pillars of our Court system. Despite threatened monetary sanctions which exceeded $1.5 Million imposed in the *Kawamata/Tomono* cases, Du Pont has repeatedly ignored lawful orders issued from this Court as well as other forums. Where normally an award of attorneys' fees and cost would insure compliance,

to Du Pont, such an award is insignificant. Petitioners would prefer to leave the imposition of sanctions to the discretion of the Court. However, in light of the horrendous history of utter disregard for Courts and the judicial system displayed by Du Pont and its attorneys, Petitioners would recommend sanctions as follows:

(1) Sanctions of $1.5 Million for violation of the Stipulated Settlement & Order by the filing of the Notice of Removal and the Counterclaim. Said sum shall be paid to Petitioners.

(2) After September 11, 1997, if compliance with the Settlement Stipulation And Order is not effected, the Court should impose additional sanctions of $1.5 Million per day until the Notice of Removal is Withdrawn and the Counterclaim is dismissed.

(3) The award of attorneys' fees and costs to Petitioners for responding to the Notice of Removal, filing the Motion to Dismiss, filing the present Motion.

(4) That the Court order a representative from Du Pont, with decision making authority with respect to the prosecution of claims and litigation, to appear before this Court on September 11, 1997, along with a representative of the Law Firm.

(5) That this Court reconvene on September 11, 1997 to see if Du Pont has withdrawn the Notice of Removal and had the Counterclaim dismissed. Alternatively, if the Federal Court proceedings have *not* been withdrawn, then the Court

should question the Du Pont Representative and Counsel to see if they or Representatives intend to comply with the Order of the Court. If they indicate that they intend to comply, no further sanctions should be imposed. If Du Pont has complied, the $1.5 Million, sanction should be withdrawn.

(6) If Du Pont and The Law Office indicate that they have no intention of withdrawing the Notice of Removal and having the Counterclaim dismissed, then they should be placed in the custody of the Third Circuit Court until such time that compliance is achieved. The $1.5 Million in sanctions plus the award for attorneys' fees and costs should be affirmed. Additional sanctions in the amount of $1.5 Million per day should be imposed until compliance.

G. THE THIRD CIRCUIT COURT HAS THE POWER TO FURTHER ENJOIN DU PONT AND THE OTHER CONTEMNORS FROM FURTHER VIOLATING THE STIPULATED SETTLEMENT AND ORDER

The trial court has the inherent power and original jurisdiction to rectify wrongs which took place before it. *Magoon v. Magoon* 70 Haw. 605, 610 (1989). Further, a constitutionally established forum has the power to grant and fashion equitable and legal remedies to prevent a party from benefiting from his misdeeds. *Hazel Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944). As noted above, this court has the inherent power to fashion a remedy to enforce a lawful order of this Court (Section 603-21.9, HRS. See also *Kukui Nuts of Hawaii v. R. Baird & Co. Inc.* 7 Haw.App. 598, 624).

Appendix 1

Concurrent with holding Du Pont and The Law Firm in civil contempt, Petitioners seek an order from this court prohibiting Contemnors from further violating the Stipulated Settlement and Order. Contemnors should be prohibited from filing or maintaining any actions against Petitioners in Federal Court, or any other Forum, relating to the Tortiously Instigated Settlement. As part of the order compelling Du Pont to withdraw its request for Removal and the Counterclaim, this court should inform Du Pont and The Firm that any further violations will result in sanctions in the amount of $1.5 Million for each violation of the proposed order.

III. *CONCLUSION.*

For all of the above-stated reasons, Petitioners respectfully request that their motion be granted.

DATED: Honolulu, Hawaii, August 28, 1997.

s/ Melvin Y. Agena
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Appendix 1

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APPENDIX J — 3d Cir. Ct. of State of Haw. ["Wrongful Removal Cases"]: PETITIONERS' MOTION FOR PRELIMINARY AND PERMANENT INJUNCTION DATED AUGUST 28, 1997

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Appendix J

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT
STATE OF HAWAII

S. P. NO.

CHIAKI KATO and HARVEY TOMONO;

Petitioners,

– vs –

E. I. DU PONT De NEMOURS & COMPANY; and
GOODSILL ANDERSON QUINN & STIFEL;

Respondents.

PETITIONERS' MOTION FOR PRELIMINARY AND PERMANENT INJUNCTION; MEMORANDUM IN SUPPORT OF PETITIONERS' MOTION FOR PRELIMINARY AND PERMANENT INJUNCTION; AFFIDAVIT OF MELVIN Y. AGENA; EXHIBITS "1" TO "11"; NOTICE OF HEARING; CERTIFICATE OF SERVICE

Date: September 9, 1997
Time: 8:30 a.m.
Judge: Ronald Ibarra

PETITIONERS' MOTION FOR PRELIMINARY AND PERMANENT INJUNCTION

Appendix J

COME NOW, CHIAKI KATO ("Kato") and HARVEY TOMONO ("Tomono"), by and through their counsels, and hereby move this Honorable Court to issue a preliminary injunction, enjoining Respondents, E.I. Du Pont De Nemours & Company ("Du Pont") and the Law Firm of Goodsill Anderson Quinn & Stifel ("The Law Firm"), from violating the Stipulations for Dismissal with Prejudice of All Claims and Parties ("Settlement Stipulations and Orders"), dated October 28, 1994, which were entered in the following cases: (a) *Kato et al. v. Du Pont De Nemours & Company, et al.*, Civil No. 93-309K ("Kato Lawsuit") and (b) *Glover Orchids, Inc. et al. v. E.I. Du Pont De Nemours & Company*, Civil No. 93-063K ("Tomono Lawsuit").

Du Pont and the Law Firm violated the provisions of the Settlement Stipulations and Orders by seeking to remove the current lawsuit entitled *Exotics Hawaii Kona et al. v. E.I. Du Pont De Nemours & Company*, filed in the Circuit Court of the Third Circuit, Civil No. 97-103K ("Class Action"), to the United States District Court, State of Hawaii ("Federal Court"). Further, Du Pont, through The Law Firm, has filed Counterclaims against Petitioners in Federal Court. The actions of Du Pont and The Law Firm violates Petitioners' right to have all matters relating to the Settlement Stipulations and Orders litigated within the Circuit Court of the Third Circuit, as specified by said Stipulations and Orders. Petitioners will be irreparably harmed if Du Pont and The Law Firm were permitted to violate the Stipulations and Orders and allowed to litigate matters related to the Tortiously Instigated Settlements, in Federal Court.

This Motion is brought pursuant to Rules 7 and 65 of the Hawaii Rules of Civil Procedure, and is based upon the

memorandum attached hereto and made a part hereof, the records and files of the Court, and such other matters as may be presented at a hearing on said Motion.

DATED: Honolulu, Hawaii, August 28, 1997.

s/ Melvin Y. Agena
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IN THE CIRCUIT COURT OF THE THIRD CIRCUIT
STATE OF HAWAII

S. P. NO.

CHIAKI KATO and HARVEY TOMONO;

Petitioners,

– vs –

E. I. DU PONT De NEMOURS & COMPANY; and
GOODSILL ANDERSON QUINN & STIFEL;

Respondents.

MEMORANDUM IN SUPPORT OF PETITIONERS' MOTION FOR PRELIMINARY AND PERMANENT INJUNCTION

COME NOW, PETITIONERS, CHIAKI KATO ("Kato") and HARVEY TOMONO ("Tomono"), by and through their counsels, and hereby file this Memorandum in Support of their Motion for Preliminary and Permanent Injunction ("Injunction Motion").

Kato and Tomono ("Petitioners") hereby petition this Honorable Court for an order directing Respondents, E.I. Du Pont De Nemours & Company ("Du Pont") and their Counsel, the Law Firm of Goodsill Anderson Quinn & Stifel ("The Law Firm"), from pursuing and litigating any claims related to the Settlement Stipulations and Orders referred to

hereinafter in the United States District Court, District of Hawaii ("Federal Court"). The removal by Du Pont and The Law Firm ("Respondents") of the case entitled *Exotics Hawaii Kona, Inc. et al. v. E.I. Du Pont De Nemours & Company*, filed herein as Civil No. 97-103K ("Class Action"), violated the provisions of the Settlement Stipulations and Orders, which specifically required all claims related to the settlement to be litigated in the Circuit Court of the Third Circuit ("Third Circuit Court"). Respondents have further violated the Settlement Stipulations and Orders by filing a Counterclaim against Petitioners in the Federal Court. The Counterclaim presents matters relating to "disputes" connected with the Settlement Stipulations and Orders. By the terms of the Settlement Stipulations and Orders, *all* parties, including the Petitioners and Du Pont, are required to litigate and try matters related to the Settlement Stipulations and Orders within the Third Circuit Court.

Petitioners would be irreparably harmed if Respondents are permitted to prosecute claims in the Federal Court since they would lose the right to litigate in the forum of their choice as required by the Settlement Stipulations and Orders. Du Pont agreed in writing to have the Third Circuit Court retain jurisdiction over all disputes relating to the Stipulated Settlements and Orders. Unless Du Pont and the Law Firm are enjoined, Petitioners are faced with the possibility that the Federal Court will exercise jurisdiction over the Class Action Complaint and the Counterclaim. If this should occur, Petitioners will lose their significant and bargained for right to have all claims resolved in the Third Circuit Court. Once the Federal Court renders its decision and retains jurisdiction,

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Petitioners would have lost their right to have the Class Action and the Counterclaim adjudicated in the Third Circuit Court.

I. *STATEMENT OF FACTS.*

* * *

II. *ARGUMENTS.*

A. THE SETTLEMENT STIPULATIONS AND ORDERS ARE CLEAR: DU PONT HAD AFFIRMATIVELY COVENANTED TO LITIGATE ALL DISPUTES CONCERNING THE TORTIOUSLY INSTIGATED SETTLEMENTS IN THE THIRD CIRCUIT COURT.

* * *

B. DU PONT HAS WAIVED ITS RIGHT TO ASSERT ANY COUNTERCLAIM IN THE FEDERAL COURTS OR TO REMOVE THE ORIGINAL COMPLAINT TO THE FEDERAL COURT.

* * *

C. DU PONT SHOULD BE EQUITABLY ESTOPPED FROM ASSERTING AFFIRMATIVE CLAIMS IN FEDERAL COURT OR TO REMOVE THE ORIGINAL COMPLAINT TO THE FEDERAL COURT

* * *

D. THE THIRD CIRCUIT COURT HAS THE INHERENT POWER TO ENFORCE ORDERS WHICH IT HAS ISSUED.

Aside from being a contractual agreement, the Settlement Stipulations and Orders *are court orders* which were generated from this Third Circuit Court. A trial court is empowered under Section 603-21.9, HRS to:

> (6) To make and award such judgments, decrees, orders, and mandates, issue such executions and other processes, and *do such other acts and take such other steps as may be necessary to carry into full effect the powers which are or shall be given to them by law or for the promotion of justice in matters pending before them* ("Emphasis Added").

It is a well recognized principle that courts of record have the inherent power to enforce its orders by way of civil contempt. *U.S. v. State of Hawaii*, 855 F.Supp. 212 (D. Haw. 1995) (See also *Coll v. Desha* 27 Haw. 855 (1944) stating that the trial court has the inherent power hold a party in contempt; *Application of Balucan*, 44 Haw. 271, 357 P.2d

631 (1960) that the traditional means for compelling a party to obey a court order is through the use of the contempt power).

E. THIS COURT SHOULD GRANT PETITIONERS' REQUEST FOR A PRELIMINARY INJUNCTION TO PREVENT THEM FROM BEING IRREPARABLY HARMED BY HAVING THE CLASS ACTION AND THE COUNTERCLAIM LITIGATED IN THE FEDERAL COURT IN EXPRESS VIOLATION OF THE TERMS OF THE STIPULATED SETTLEMENTS AND ORDERS

The granting of preliminary or permanent injunctive relief rests within the sound discretion of the trial court. The decision of the trial court in granting an injunction will not be disturbed absent a clear showing that the lower court manifestly abused its discretion. *Hawaii Public Employment Relations Board v. United Public Workers, Local 646 AFSCME, AFL-CIO* (66 Haw. 461, 667 P.2d 783) (1963).

In *Penn v. Tranportation Lease Hawaii, Ltd.*, 2 Haw.App. 272, 276 (1981), the Hawaii Appellate Court set forth the perameters for issuing an injunction:

> The modern test for interlocutory injunctive relief is threefold: (1) Is the party seeking the injunction likely to prevail on the merits? (2) Does the balance of irreparable damage favor issuance of an interlocutory injunction? (3) To the extent that the public interest is involved, does it support

granting the injunction? *Life of the Land v. Arivoshi*, 59 Haw. 156, 577 P.2d 116 (1978).

Application of the above-stated criteria is based upon a sliding scale. See *Fox Valley Harvestore v. A.O. Smith Harvestore Prod.*, 545 F.2d 1096 (7th Cir. 1976) and *Benda v. Grand Lodge of Intern. Association, Etc.*, 584 F.2d 308 (9th Cir. 1978), holding that the more a party demonstrates that he will be irreparably harmed, the less the party seeking the injunction needs to demonstrate that he will succeed on the merits. Conversely, the greater the probability that the party seeking injunctive relief shows that he will prevail on the merits, the less he need to show that he will be irreparably harmed if the injunction is not granted.

F. THE FACTS AND THE APPLICABLE LAW MAKE IT CLEAR THAT PETITIONERS SHOULD PREVAIL ON THE MERITS OF THE CASE.

As noted above, Petitioners have demonstrated that they will prevail on the merits of their claim for enforcement of the Settlement Stipulations and Orders. The terms of the Settlement Stipulations and Orders are clear, unambiguous and uncontradictable. The mutual covenants contained in the Settlement Stipulations and Orders are sufficient to sustain the enforcement of its terms (*Guaschino v. Eucalyptus, Inc.* 3 Haw.App. 632, 658 P.2d 888 (1983)). The case law is clear that a party can waive the right to litigate matters in the Federal Courts (16 *Moore's Federal Practice 3rd*, Section 107.18[1][b]. Du Pont has expressly waived its right to litigate any claims related to the Tortiously Instigated

Settlements in the Federal Court (*Association of Owners of Kukui Plaza v. Swinerton & Walberg Co.*, 68 Haw. 98, 705 P.2d 28 (1985). Under the doctrines of "equitable estoppel" and "quasi-estoppel", Du Pont should be precluded from denying that it has forfeited its right of removal or to commence an action, in Federal Court based upon diversity jurisdiction. *Strouss v. Simmons*, 66 Haw. 32, 657 P.2d 1004 (1982); *Maria v. Freitas*, 73 Haw. 226, 832 P.2d 259 (1992).

G. PETITIONERS' RIGHT TO LITIGATE ITS CLAIMS IN THE THIRD CIRCUIT COURT MAYBE IRREPARABLY LOST IF AN INJUNCTION IS NOT GRANTED.

What Petitioners are seeking to protect is their contractual right to litigate their claims and defend any action asserted against them, arising from the Tortiously Instigated Settlements, in the Third Circuit Court. The enforcement of a contractual right or specific performance is a proper subject for injunctive relief. (*Rawlins v. Izumo Taisha Kyo Mission of Hawaii*, 36 Haw. 721 (1944); *Sandstrom v. Larsen*, 59 Haw. 491, 583 P.2d 971 (1978), holding that the restrictive covenants may be enforced by injunctive relief.)

Whether injunctive relief should be granted is determined by whether a party would be irreparably harmed. As noted in *Klausmeyers v. Makaha V.F. Ltd., et al.*, 41 Haw. 287, 339 (1956):

> As ordinarily understood, an injury is irreparable, within the law of injunctions, where it is of such a character that a fair and reasonable redress may

> not be had in a court of law, so that to refuse the injunction would be a denial of justice; where, in other words, from the nature of the act, or from the circumstances surrounding the person injured, or from the financial condition of the person committing, it cannot be readily, adequately, and completely compensated for with money . . . The term "irreparable damage" does not have reference to the amount of damage caused, but rather to the *difficulty of measuring the amount of damages inflicted* . . . (emphasis added)

Here, Petitioners' right to litigate in the Third Circuit Court may be lost. If Du Pont and The Law Firm are permitted to argue for removal of the Complaint, the Federal Court may grant their request. Du Pont will be able to do this, despite the fact that Du Pont has expressly waived its right to litigate in any other forum, except in the Third Circuit Court. Once the Federal Court makes its decision, Petitioners would have lost their "right" to litigate in the Third Circuit Court. No value can be placed upon the loss of Petitioners' right. No remedy, except specific performance, would grant Petitioners the benefit of their bargain. The hearing on the Motion to Remand is scheduled for argument on September 12, 1997. Petitioners face the possibility that the Federal Court may fail to recognize and perserve Petitioners' right to litigate in the Third Circuit Court. Petitioners would be denied substantial justice if a preliminary injunction is not issued by this Court.

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H. PETITIONERS ARE NOT SEEKING AN ORDER WHICH WOULD INTERFERE WITH THE JUDICIAL POWERS OF THE FEDERAL COURT

Petitioners want to make the record clear that they are *not* seeking and order from the Third Circuit Court which would interfere with the powers of the Federal Court. Nothing in this application should be construed as a request by Petitioners that the Third Circuit Court issue an order, precluding the Federal Court from determining the issues of removal and jurisdiction.

What Petitioners are seeking is injunctive relief, in the form of an order *directed to Du Pont and The Law Firm*, precluding them from asserting rights which they have waived. What Petitioners are seeking is an order granting them specific performance and bestowing upon them the bargained for right to litigate matters in the Third Circuit Court.

III. *CONCLUSION.*

Based upon the arguments set forth hereinabove, Petitioners seek injunctive relief, precluding Du Pont and The Law Firm from prosecuting or defending any claims in the Federal Court. If they violate the injunction which is issued by this Court, Petitioners should be awarded damages in an amount which this Court deems appropriate. However, in light of the nature of the claims asserted by Petitioners as part of their Complaint, the amount of damages which should

be awarded to them should bear some relationship to the total amount of claims which they seek to assert in the Third Circuit Court.

DATED: Honolulu, Hawaii, August 28, 1997.

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APPENDIX K — 3d Cir. Ct. of State of Haw. ["Wrongful Removal Cases"]: PETITIONERS CHIAKI KATO AND HARVEY TOMONO'S EX PARTE MOTION FOR TEMPORARY RESTRAINING ORDER DATED SEPTEMBER 7, 1997

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Appendix K

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT
STATE OF HAWAII

S.P. No. 97-024K

CHIAKI KATO AND HARVEY TOMONO,

Petitioners,

vs.

E.I. DU PONT De NEMOURS & COMPANY;
GOODSILL ANDERSON QUINN & STIFEL;
A Law Partnership,

Respondents.

PETITIONERS CHIAKI KATO AND HARVEY TOMONO'S EX PARTE MOTION FOR TEMPORARY RESTRAINING ORDER; MEMORANDUM IN SUPPORT OF PETITIONERS CHIAKI KATO AND HARVEY TOMONO'S EX PARTE MOTION FOR TEMPORARY RESTRAINING ORDER; AFFIDAVIT OF MELVIN Y. AGENA; EXHIBITS 1-16

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IN THE CIRCUIT COURT OF THE THIRD CIRCUIT
STATE OF HAWAII

S.P. No.

CHIAKI KATO and HARVEY TOMONO,

Petitioners,

vs.

E.I. DU PONT De NEMOURS & COMPANY; GOODSILL ANDERSON QUINN & STIFEL; A Law Partnership,

Respondents.

PETITIONERS CHIAKI KATO AND HARVEY TOMONO'S EX PARTE MOTION FOR TEMPORARY RESTRAINING ORDER

COME NOW PETITIONERS, CHIAKI KATO and HARVEY TOMONO, by and through their counsels, and hereby move this Honorable Court to issue a temporary restraining order ("TRO") against Respondents E.I. Du Pont De Nemours & Company ("Du Pont") and the Law Firm of Goodsill Anderson Quinn & Stifel ("The Law Firm").

Petitioners are seeking a TRO against Respondents for violating the Orders of the Circuit Court of the Third Circuit, State of Hawaii ("Third Circuit Court") on *three (3) separate occasions*. The first time occurred when Respondents attempted to remove the Class Action filed by Petitioners to

the Federal Court. The second time occurred when Respondents caused a Counterclaim to be filed against Petitioners in the Federal Court. The third, and most egregious, violation occurred when Respondents sought removal of the OSC and Injunction Motions to the Federal Court, which Petitioners filed to enable the Third Circuit Court to enforce its prior Orders.

In particular, Petitioners seek to restrain Du Pont and the Law Firm ("Respondents") from further violating the terms and conditions of the Stipulations for Dismissal with Prejudice of All Claims and Parties ("Settlement Stipulations and Orders") dated October 28, 1994, which were entered in the following cases: (a) *Kato et. al. v. Du Pont De Nemours & Company, et. al.*, Civil No. 93-309K ("Kato Law suit") and (b) *Glover Orchids, Inc. et. al. v. E.I. Du Pont De Nemours & Company*, Civil No. 93-063K ("Tomono Lawsuit"). Both the Kato and Tomono Lawsuits were filed in the Third Circuit Court.

As noted above, Respondents have violated the provisions of the Settlement Stipulations and Order by seeking to remove the current action entitled *Exotics Hawaii Kona et. al. v. E.I. Du Pont De Nemours & Company, et. al.*, filed in the Circuit Court of the Third Circuit, Civil No. 97-103K ("Class Action"), to the United States District Court, State of Hawaii ("Federal Court"). Upon filing of the Notice of Removal, on June 9, 1997, the Class Action was redesignated as Civil No. 97-00740 DAE. ("Federal Action").

Petitioners and others filed a Motion for Remand on July 9, 1997, thereby requesting the Federal Court not to exercise

jurisdiction over the claims of Petitioners. A hearing on the Motion for Remand is currently scheduled for argument on September 12, 1997.

Respondents have, on July 31, 1997, further violated the Settlement Stipulations and Order by filing a Counterclaim against Petitioners.

Petitioners filed a Motion for Preliminary Injunction in the Third Circuit Court, S.P. No. 97-023K ("Injunction Motion") and a Motion for Order to Show Cause Why [Respondents] Should Not Be Held in Contempt of Court. ("OSC Hearing"). Incredibly, Respondents on September 5, 1997, filed a Notice to Remove the Injunction and the OSC Hearing to Federal Court.

Respondents, throughout the underlying *Benlate* litigation have shown disdain, disregard, disobedience and utter contempt to Orders issued by the Third Circuit Court. Respondents have engaged in unspeakable litigation abuses to the point that this Court sanctioned Du Pont 1.5 million dollars. Du Pont has continued to engage in a conscious, deliberate and intentional patter of deception and deceit. This despicable scheme to usurp and defy the power of this Third Circuit Court continues today.

Petitioners seek a TRO to prevent Respondents from violating the express orders of this Third Circuit Court and to preserve Petitioners' right to have the Third Circuit Court enforce its own orders and have all matters related to the any alleged settlement adjudicated in Hawaii State Courts. In particular, Petitioners are seeking to enjoin Respondents

from going forward with the Motion for Remand hearing, circumventing any action filed by Petitioners in the Third Circuit Court or to otherwise seek the invocation of the Federal Court's jurisdiction over the Class Action until such time that this Court has had an opportunity to hear Petitioners' arguments on the merits.

Respondents' conduct in seeking to remove the Class Action, Counterclaim, Injunction and OSC Motions to Federal Court is a blatant and clear violation of the terms of the Settlement Stipulations and Orders which provides in the pertinent part that, "not withstanding the dismissal with prejudice of this action [previously filed claims in the Kato and Tomono lawsuits], this Court [Third Circuit Court] shall retain jurisdiction to resolve any disputes amongst the parties relating to this action, including, but not limited to disputes arising out of its settlement."

Unless a TRO is granted, Petitioners will be irreparably harmed if the Federal Court decides to exercise jurisdiction over the Class Action, Injunction and OSC Motions. Petitioners will lose their right to have their claims tried and adjudicated in the Third Circuit Court, as clearly stated in the Settlement Stipulations and Orders. More importantly, Respondents will have deprived this Court of the power to enforce and interpret its own Orders. Petitioners will have lost the benefit of their Court approved bargain. Du Pont will have once again violated an order of this Court with apparent impunity. If the Federal Court renders a decision to retain jurisdiction on September 12, 1997, or if such a decision is issued prior to Preliminary Injunction Hearing, an order from this Court compelling Petitioners *not* to pursue

the Federal Action would be "moot" since the Federal Court will have already exercised jurisdiction over the Class Action Claims, and this Court does not have the power to compel the Federal Court to remand the case back to the Third Circuit Court.

The granting of the TRO is essential to ensure that the preliminary injunction hearing is "meaningful" in that this Court will be in a position to grant Petitioners adequate and just relief. *Life of the Land v. Ariyoshi* 59 Haw. 156, 577 P.2d. 1116 (1978). Without a TRO, the Motion for Injunctive Relief may be transformed into a hollow ritual.

This Motion is made pursuant to Rule 65 of the Hawaii Rules of Civil Procedure, and is based upon the affidavit of counsel, the memorandum of law attached hereto, the records and files of this case, and such other matters as may be presented in support of this Motion.

DATED: Honolulu, Hawaii, September 7, 1997.

s/ Melvin Y. Agena
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RICCIO M. TANAKA
MARK B. HUTTON
DANIEL W. SIGELMAN

Attorneys for Petitioners
CHIAKI KATO & HARVEY TOMONO

Appendix K

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT
STATE OF HAWAII

S. P. NO.

CHIAKI KATO and HARVEY TOMONO;

Petitioners,

– vs –

E. I. DU PONT De NEMOURS & COMPANY; and
GOODSILL ANDERSON QUINN & STIFEL;

Respondents.

MEMORANDUM IN SUPPORT OF PETITIONERS CHAIKI KATO AND HARVEY TOMONO'S EX PARTE MOTION FOR TEMPORARY RESTRAINING ORDER ("TRO")

COME NOW, PETITIONERS, CHIAKI KATO ("Kato") and HARVEY TOMONO ("Tomono"), by and through their counsels, and hereby file this Memorandum in Support of their Ex Parte Motion for Temporary Restraining Order ("TRO").

Kato and Tomono ("Petitioners") hereby petition this Honorable Court for an order prohibiting Respondents, E.I. Du Pont De Nemours & Company ("Du Pont") and their Counsel, the Law Firm of Goodsill Anderson Quinn & Stifel ("The Law Firm"), from pursuing and litigating any claims

related to the Settlement Stipulations and Orders referred to hereinafter in the United States District Court, District of Hawaii ("Federal Court"). Additionally, Petitioners seek an Order preventing Respondents from removing any action filed by Petitioners in the Third Circuit Court seeking injunctive or other relief to the Federal Court.

The removal by Du Pont and The Law Firm ("Respondents") of the case entitled *Exotics Hawaii Kona, Inc. et al. v. E.I. Du Pont De Nemours & Company*, filed herein as Civil No. 97-103K ("Class Action"), violated the provisions of the Settlement Stipulations and Orders, which specifically required all claims related to the settlement to be litigated in the Circuit Court of the Third Circuit ("Third Circuit Court"). Respondents have further violated the Settlement Stipulations and Orders by filing a Counterclaim against Petitioners in the Federal Court. The Counterclaim presents matters relating to "disputes" connected with the Settlement Stipulations and Orders. Respondents have further violated the Settlement Stipulations and Orders by depriving the Third Circuit Court the opportunity to interpret and enforce its own Orders. Respondents removed the OSC and Injunction Motions to the Federal Court, in an blatant attempt to escape sanctions flowing from their violation of the Third Circuit Court's Orders. *Again*.

The issues before the Court are simple. Will the Third Circuit Court enforce its prior Orders or will Du Pont and its attorneys be able to blatantly ignore the clear orders of this Court . . . *AGAIN*!. Will this Court be deprived of its inherent powers to enforce and interpret its own orders. Will this Court exercise its sovereign right to compel parties

lawfully before it to obey its order. Will this Court enforce a Stipulation and Order and protect the rights of Petitioners who relied upon the power of the court for enforcement.

Petitioners would be irreparably harmed if Respondents are permitted to prosecute claims in the Federal Court since they will lose their right to litigate in the forum of their choice as required by the Settlement Stipulations and Orders. Du Pont agreed in writing to have the Third Circuit Court retain jurisdiction over all disputes relating to the Stipulated Settlements and Orders. Unless Du Pont and the Law Firm are enjoined, Petitioners are faced with the possibility that the Federal Court will exercise jurisdiction over the Class Action Complaint and the Counterclaim. If this should occur, Petitioners will lose their significant and bargained for right to have all claims resolved in the Third Circuit Court. Once the Federal Court renders its decision and retains jurisdiction, Petitioners will lose their right to have the Class Action and the Counterclaim adjudicated in the Third Circuit Court.

Moreover, unless a TRO is issued, the sovereignty and power of the Third Circuit Court will dissipate and be rendered impotent. By removal of the OSC and Injunction Motions, Respondents are directly challenging the power of this Court to interpret and enforce its own orders. In doing so, Respondents are attempting to deprive Petitioners the right to seek redress in the forum where the Settlement Stipulations and Orders were formulated.

For these reasons, a TRO against Respondents and The Firm is necessary to prevent Petitioners' right to litigate claims in the Third Circuit Court from being lost. Du Pont

and The Law Firm's proclivity to violate Orders of this Court, the filing of the First and Second Notices of Removal and Counterclaim demonstrates the Petitioners will be irreparably harmed by Respondents.

I. STATEMENT OF FACTS.

* * *

E. INJUNCTION AND OSC MOTIONS.

1. On September 3, 1997, Petitioners filed their Motion for Preliminary Injunction and Memorandum in Support thereof. (See Exhibit 12). ("Injunction Motion"). Petitioners also filed a Motion for Order to Show Cause Why Du Pont and the Law Firm should not be held in Contempt of Court for violation of the Settlement Stipulations and Orders. (See Exhibit 13). ("OSC Motion")

2. Hearing on the Injunction and OSC Motions were scheduled for October 16, 1997. This is the earliest hearing date apparently available to the Court.

F. SECOND REMOVAL NOTICE.

1. On September 4, 1997, counsel for Petitioners, Melvin Y. Agena, contacted John Lacy, attorney for Du Pont and a partner in the Law Firm. Agena requested that Du Pont agree to a Stipulation Continuing the hearing on the Motion to Remand to a date *after* October 16, 1997. This request was refused despite advising Lacy that Petitioners would seek a TRO if a stipulation was not given.

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2. On September 5, 1997, Respondents incredibly filed a Notice of Removal ("Second Removal Notice") seeking to remove the OSC and Injunction Motions to Federal Court.

3. The Second Removal Notice concedes that claims asserted in the OSC and Injunction Motions were "claims arising from the settlement in 1994 of the underlying product liability action against Du Pont. (Second Remand Notice at para. 1).

4. Respondents gleefully noted that "state courts are completely without power to restrain federal court proceedings . . ." (Second Removal Notice at para. 10).

5. Finally, Respondents argue that the term "shall" utilized in the Settlement Stipulations & Orders, is "permissive rather than mandatory." (Second Removal Notice at para. 14).

6. It is clear that if Respondents are permitted to remove the action to the Federal Court, they will attempt to confuse the Federal Court into believing that what is *clear and unambiguous*, requires judicial "redefinition". This is something that Respondents would *not* be able to do in the Third Circuit Court since the Third Circuit Court issued the order.

7. Without the TRO, Respondents will deny this Court the opportunity and the power to interpret its own Orders. Even if this Court interprets the Settlement Stipulations & Orders differently from the Federal Court, the ruling of the Federal Court would control since a State Court cannot

overrule a Federal Court. Petitioners would thereby be denied justice.

II. ARGUMENTS.

A. THE SETTLEMENT STIPULATIONS AND ORDERS ARE CLEAR: DU PONT HAD AFFIRMATIVELY COVENANTED TO LITIGATE ALL DISPUTES CONCERNING THE TORTIOUSLY INSTIGATED SETTLEMENTS IN THE THIRD CIRCUIT COURT.

* * *

B. DU PONT HAS WAIVED ITS RIGHT TO ASSERT ANY COUNTERCLAIM IN THE FEDERAL COURTS OR TO REMOVE THE ORIGINAL COMPLAINT TO THE FEDERAL COURT.

* * *

C. DU PONT SHOULD BE EQUITABLY ESTOPPED FROM ASSERTING AFFIRMATIVE CLAIMS IN FEDERAL COURT OR TO REMOVE THE ORIGINAL COMPLAINT TO THE FEDERAL COURT.

* * *

D. THE THIRD CIRCUIT COURT HAS THE INHERENT POWER TO ENFORCE ORDERS WHICH IT HAS ISSUED.

* * *

E. THIS COURT SHOULD GRANT PETITIONERS' REQUEST FOR A TRO TO PREVENT THEM FROM BEING IRREPARABLY HARMED BY HAVING THE CLASS ACTION AND THE COUNTERCLAIM LITIGATED IN THE FEDERAL COURT IN EXPRESS VIOLATION OF THE TERMS OF THE STIPULATED SETTLEMENTS AND ORDERS.

The granting of TRO or other injunctive relief rests within the sound discretion of the trial court. The decision of the trial court in granting an injunction will not be disturbed absent a clear showing that the lower court manifestly abused its discretion. *Hawaii Public Employment Relations Board v. United Public Workers, Local 646 AFSCME, AFL-CIO* (66 Haw. 461, 667 P.2d 783) (1963).

In *Penn v. Tranportation Lease Hawaii, Ltd.*, 2 Haw.App. 272, 276 (1981), the Hawaii Appellate Court set forth the perimeters for issuing an injunction:

> The modern test for interlocutory injunctive relief is threefold: (1) Is the party seeking the injunction likely to prevail on the merits? (2) Does the balance of irreparable damage favor issuance of

an interlocutory injunction? (3) To the extent that the public interest is involved, does it support granting the injunction? *Life of the Land v. Ariyoshi*, 59 Haw. 156, 577 P.2d 116 (1978).

Application of the above-stated criteria is based upon a sliding scale. See *Fox Valley Harvestore v. A.O. Smith Harvestore Prod.*, 545 F.2d 1096 (7th Cir. 1976) and *Benda v. Grand Lodge of Intern. Association, Etc.*, 584 F.2d 308 (9th Cir. 1978), holding that the more a party demonstrates that he will be irreparably harmed, the less the party seeking the injunction needs to demonstrate that he will succeed on the merits. Conversely, the greater the probability that the party seeking injunctive relief shows that he will prevail on the merits, the less he needs to show that he will be irreparably harmed if the injunction is not granted.

F. THE FACTS AND THE APPLICABLE LAW MAKE IT CLEAR THAT PETITIONERS SHOULD PREVAIL ON THE MERITS OF THE CASE.

As noted above, Petitioners have demonstrated that they will prevail on the merits of their claim for enforcement of the Settlement Stipulations and Orders. The terms of the Settlement Stipulations and Orders are clear, unambiguous and uncontradicted. The mutual covenants contained in the Settlement Stipulations and Orders are sufficient to sustain the enforcement of its terms (*Guaschino v. Eucalyptus, Inc.* 3 Haw. App. 632, 658 P.2d 888 (1983)). The case law is clear that a party can waive the right to litigate matters in the Federal Courts (16 *Moore's Federal Practice* 3rd, Section

107.18[1][b]). Du Pont has expressly waived its right to litigate any claims related to the Tortiously Instigated Settlements in the Federal Court (*Association of Owners of Kukui Plaza v. Swinerton & Walberg Co.*, 68 Haw. 98, 705 P.2d 28 (1985). Under the doctrines of "equitable estoppel" and "quasi-estoppel", Du Pont should be precluded from denying that it has forfeited its right of removal, or to commence an action, in Federal Court, based upon diversity jurisdiction. *Strouss v. Simmons*, 66 Haw. 32, 657 P.2d 1004 (1982); *Maria v. Freitas*, 73 Haw. 226, 832 P.2d 259 (1992).

G. PETITIONERS' RIGHT TO LITIGATE ITS CLAIMS IN THE THIRD CIRCUIT COURT MAYBE IRREPARABLY LOST IF A TRO IS NOT GRANTED.

What Petitioners are seeking to protect is their contractual right to litigate their claims and defend any action asserted against them, arising from the Tortiously Instigated Settlements, in the Third Circuit Court. The enforcement of a contractual right or specific performance is a proper subject for injunctive relief. (*Rawlins v. Izumo Taisha Kyo Mission of Hawaii*, 36 Haw. 721 (1944); *Sandstrom v. Larsen*, 59 Haw. 491, 583 P.2d 971 (1978), holding that the restrictive covenants may be enforced by injunctive relief.)

Whether injunctive relief should be granted is determined by whether a party would be irreparably harmed. As noted in *Klausmeyers v. Makaha V.F. Ltd., et al.*, 41 Haw. 287, 339 (1956):

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> As ordinarily understood, an injury is irreparable, within the law of injunctions, where it is of such a character that a fair and reasonable redress may not be had in a court of law, so that to refuse the injunction would be a denial of justice; where, in other words, from the nature of the act, or from the circumstances surrounding the person injured, or from the financial condition of the person committing, it cannot be readily, adequately, and completely compensated for with money . . . The term "irreparable damage" does not have reference to the amount of damage caused, but rather to the difficulty of measuring the amount of damages inflicted . . . (emphasis added)

Here, Petitioners' right to litigate in the Third Circuit Court may be lost. If Du Pont and The Law Firm are permitted to argue for removal of the Complaint, the Federal Court may grant their request. Respondents' Second Removal Notice was a blatant attempt to insure that the Third Circuit Court will not enforce its prior Orders. Du Pont will be able to argue for removal, despite the fact that Du Pont, the Third Circuit Court and Petitioners know that Du Pont has expressly *waived* its right to litigate in any other forum, except in the Third Circuit Court. Once the Federal Court makes its decision, Petitioners would have lost their "right" to litigate in the Third Circuit Court. No value can be placed upon the loss of Petitioners' right. No remedy, except specific performance, would grant Petitioners the benefit of their bargain. The hearing on the Motion to Remand is scheduled for argument on September 12, 1997. Petitioners face the possibility that the Federal Court may fail to recognize and

preserve Petitioners' right to litigate in the Third Circuit Court. Petitioners would be denied substantial justice if a TRO is not issued by this Court.

H. THE GRANTING OF A TRO IS NECESSARY TO PRESERVE THE STATUS QUO UNTIL THE MERITS OF THE PRELIMINARY INJUNCTION CAN BE ARGUED.

The granting of a TRO is appropriate to create or preserve a state of affairs such that the court will be able to render a *meaningful decision on the merits. Life of the Land v. Ariyoshi* 59 Haw. 156, 577 P.2d 1116 (1978). What Petitioners are seeking is an order preserving the *status quo*, until such time as the Third Circuit Court can definitively interpret its own Orders. Unless a TRO is issued, the Third Circuit Court will never have an opportunity to interpret and enforce its own Orders. Should the Federal Court rule that it will retain jurisdiction, any declaration by the Third Circuit Court on the interpretation of the Settlement Stipulations & Orders will be "*meaningless*" instead of "meaningful". As a practical matter, Petitioners will have lost their right to an adequate, meaningful and equitable remedy. This is just the type of situation where a TRO is appropriate.

I. PETITIONERS ARE NOT SEEKING AN ORDER WHICH WOULD INTERFERE WITH THE JUDICIAL POWERS OF THE FEDERAL COURT.

Petitioners want to make the record clear that they are not seeking an order from the Third Circuit Court which

would interfere with the powers of the Federal Court. Nothing in this application should be construed as a request by Petitioners that the Third Circuit Court issue an order, precluding the Federal Court from determining the issues of removal and jurisdiction.

What Petitioners are seeking is injunctive relief, in the form of an order, directed to Du Pont and The Law Firm, precluding them from asserting rights which they have waived. What Petitioners are seeking is an order granting them specific performance and bestowing upon them the bargained for right to litigate matters in the Third Circuit Court.

III. CONCLUSION.

Based upon the arguments set forth hereinabove, Petitioners seek a TRO, precluding Du Pont and The Law Firm from prosecuting or defending any claims in the Federal Court. A TRO is necessary, essential and critical to preserving the *status quo* and giving this Court an opportunity to interpret and enforce its own orders.

DATED: Honolulu, Hawaii, September 7, 1997.

s/ Melvin Y. Agena
MELVIN Y. AGENA
RICCIO M. TANAKA
MARK B. HUTTON
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Attorneys for Petitioners

APPENDIX L — 9th Cir. ["Wrongful Removal Cases"]: APPELLANTS' RESPONSE TO "MOTION TO STAY THE MANDATE" DATED DECEMBER 10, 1999

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-15994
D.C. No. CV-97-01352-DAE

No. 98-16019
D.C. No. CV-97-01180-DAE

SHARON MURAKAMI and HARVEY TOMONO

Plaintiffs – Appellants,

v.

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E.I. DU PONT de NEMOURS & CO., INC., a Delaware corporation; GOODSILL ANDERSON QUINN & STIFEL,

Defendants – Appellees.

APPELLANTS' RESPONSE TO "MOTION TO STAY THE MANDATE"

Pursuant to Federal Rules of Appellate Procedure 41 and 27, and Ninth Circuit Rules 27-1 and 41-1, Appellants Murakami and Tomono oppose the request for stay of mandate submitted by Appellees on December 9, 1999.

Appellants particularly oppose Appellees' statement that a stay of this mandate will not delay or impact the "completely separate lawsuits" still proceeding between these parties in both state and federal district court in Hawaii. This Court has ruled that the lawsuits subject to this consolidated appeal involve issues which must necessarily be determined according to state law. As the Court is aware, a material issue on appeal involved application of a forum selection clause voluntarily entered by DuPont regarding future litigation. Appellants assert interpretation by the state court of the meaning and effect of that forum selection agreement is potentially dispositive regarding DuPont's ability to continue prosecution of claims against these parties in federal court. Thus, the lawsuits are not "completely separate" and delay will impact prosecution or claims in those suits.

The possibility of certiorari being granted on this claim, which is controlled by and subject to the law of the State of

Hawaii, is so remote as to be nil. The district court rejected the contention that federal question jurisdiction applied to these actions; and this Court has twice rejected Appellees' contention that important federal concerns are present in these proceedings. In fact, DuPont presented this Court with the very arguments it states will be presented in its' petition for certiorari; and this Court, being familiar with the actual record and facts as they occurred below, and cognizant of the material issues which were actually presented in these consolidated appeals, found the arguments so irrelevant as to require response only within a footnote of the decision.

The argument Appellees claim is deserving of certiorari — whether a state court can punish a party for exercising the federal right of removal — once again relies on authorities which do not involve a personal waiver of the right of removal, which do not involve contractual agreements regarding the venue of future litigation, and which omit any consideration of circumstances wherein a venue agreement was approved by, and adopted into, an order of the state court. Appellants respectfully request this Court deny Appellees' Request for Stay of Mandate.

Submitted this 10th day of December, 1999.

Respectfully,

s/ Chan P. Townsley
CHAN P. TOWNSLEY
MARK B. HUTTON
MELVIN Y. AGENA
Attorneys for Plaintiffs/Appellants Murakami and Tomono